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Supreme Court, U.S.
FILED

001313 FEB 15 2001

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No. ______

In the
Supreme Court of the United States

STERLING DREW, a minor under the age of thirteen,
by guardian ad litem Martha Drew; MARTHA DREW;
JEBEDIAH DREW,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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182 + f/o's

QUESTION PRESENTED

DID THE FOURTH CIRCUIT COURT OF APPEALS ERR IN RENDERING ITS EVENLY DIVIDED EN BANC DECISION, WHICH AFFIRMED A DECISION OF THE UNITED DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, THAT THE PETITIONERS' FORM 95, AS REQUIRED BY THE FEDERAL TORT CLAIMS ACT AND SPECIFICALLY, 28 U.S.C. SECTION 2675 (a), DID NOT PRESENT A SUFFICIENT FACTUAL PREDICATE, TO CONFER SUBJECT MATTER JURISDICTION UPON THE DISTRICT COURT, TO CONSIDER THE PETITIONERS' TORT CLAIM FOR MEDICAL MALPRACTICE BASED UPON A FAILURE TO OBTAIN INFORMED CONSENT RAISED BY THE PETITIONERS IN THEIR AMENDED COMPLAINT IN THIS ACTION?

PARTIES TO THE PROCEEDING

Petitioners

Sterling Drew, a minor under the age of thirteen years, by his Guardian Ad Litem Martha Drew, and Martha Drew and Jebediah Drew, personally. Sterling, Martha, and Jebediah Drew are all individuals with no corporate affiliations.

Respondent

The United States of America.

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The Order of the United States District Court for the District of South Carolina, in *Sterling Drew, et al. v. The United States of America*, is unreported and is set forth in Appendix D at pages 38a through 41a.

The Opinion of the Hearing Panel of the United States Court of Appeals for the Fourth Circuit in *Sterling Drew, et. al. v. United States of America*, 217 F.3d 193 (4th Circuit 2000), is set forth in Appendix A at pages 1a through 33a.

The Order of the United States Court of Appeals for the Fourth Circuit, granting the United States of America's Petition for Rehearing en banc, is unreported, and is set forth in Appendix C at pages 36a through 37a.

The Order of the United States Court of Appeals for the Fourth Circuit filed November 17, 2000, affirming the United States District Court's decision in this case referenced above by an evenly divided vote, is unreported and is set forth in Appendix B at pages 34a through 35a.

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the District Court for the District of South Carolina was entered on November 17, 2000. This Petition for Writ of Certiorari is filed within 90 days from that date. 28 U.S.C. Section 2101 (c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. SECTION 2675 (a)

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

STATEMENT OF THE CASE

Martha and Jebediah Drew are husband and wife. (App. K at 95a.)

Jebediah Drew is an enlisted person on active duty with the United States Air Force stationed at Shaw Air Force Base, South Carolina. Between 1992-1995, Martha Drew became pregnant on five (5) separate occasions even though she was using traditional birth control medication such as Ortho-Novum. (App. K at 95a-99a.) Of these five (5) pregnancies, three resulted in live births and two (2) resulted in miscarriages. (*Id.*) After having given birth to two (2) children in her first and second pregnancies, and after having undergone two (2) miscarriages in her third and fourth pregnancies, despite the fact that she was on birth control medication, Ms. Drew sought further birth control counseling from the Respondent acting through its agents and servants in the Department of the Air Force.

In the course of giving her birth control counseling, she was encouraged by various medical personnel at Shaw Air Force Base, South Carolina to try Depo-Provera by intramuscular injection, as a birth control device. According to her testimony, she was told by these medical personnel that Depo-Provera was 100% effective at preventing live births. (App. K at 139a-140a.) She was told that their was a 0.1 percent chance that she may become pregnant while on Depo-Provera but if she did, the pregnancy would spontaneously abort. (*Id.*)

Pursuant to this information that was given to her by the Department of the Air Force, she consented to undergo Depo-Provera therapy for birth control purposes. She received her first shot of Depo-Provera on July 28, 1994. (App. K at 103a.) She received her second shot of Depo-Provera on October 24, 1994, and then again on or about February 1, 1995. (App. K at 104a-105a and 110a.)

Despite this Depo-Provera therapy, the Petitioner Martha Drew became pregnant with the Petitioner Sterling Drew, and was so diagnosed at the Shaw Air Force Base hospital on May 30, 1995. (App. K at 119a-120a.) At that time, a sonogram showed the Petitioner Martha Drew to have been approximately five (5) weeks and four (4) days pregnant as of May 30, 1995. (App. K at 120a.) Contrary to the information that she had been given by the agents and servants of the Respondent, the pregnancy did not spontaneously abort but rather resulted in the live birth of the Petitioner Sterling Drew. As a result of being exposed to Depo-Provera in utero, Sterling Drew suffered numerous birth defects including an imperforate anus and a ventricular septal defected in his heart as well as genetic, developmental, glandular and mental disorders.

After the Petitioner Sterling Drew was diagnosed with these problems, the Petitioners, Martha and Jebediah Drew, filed an administrative claim with the Department of the Air Force, seeking damages. This administrative claim alleged the following information as its factual predicate: "Spontaneous delivery of male infant with imperforated anus, ventricular septal defect, left facial palsey, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital. Depo-Provera injection given to claimant in early pregnancy." (App. K at 148a.)

This administrative claim was subsequently denied by the Department of the Air Force. (*See*, App. K at 145a-147a.)

The Petitioners then timely filed the original Complaint in this action alleging that the Petitioner Martha Drew was given Depo-Provera as a birth control device by the Respondent when she was in fact pregnant with the Petitioner Sterling Drew. (App. J at 83a-89a.) Subsequently, the Petitioners moved to amend their Complaint to restate their claim for medical negligence, as one based upon a lack of a informed consent.[1]

---

[1] Subject matter jurisdiction in the United States District Court for the District of South Carolina, which was the Court of first instance in this case, was based upon the Federal Tort Claims Act. *See*, 28 U.S.C. Sections 1346 (b) and 2671 - 2680.

This motion was granted by Order entered October 15, 1998, and leave to file the Amended Complaint was reaffirmed by Summary Order of the District Court entered on October 29, 1998. (*See*, App. H at 73a-79a and 80a-82a.)

The Respondent then moved to dismiss this Amended Complaint contending that the Court lacked subject matter jurisdiction to entertain the Petitioners' informed consent claim, claiming that it was not properly presented at the administrative level pursuant to 28 U.S.C. Section 2675(a). (App. F at 61a-72a.)

By Order dated and entered December 1, 1998, the District Court granted Respondent's motion and dismissed the Petitioners' Amended Complaint with prejudice. (App. D at 38a-41a.) It is from this Order that they filed their appeal with the United States Court of Appeals for the Fourth Circuit.

The Petitioner's Appeal was heard by a three Judge Panel of the Fourth Circuit Court of Appeals in January of 2000 (hereinafter "the Hearing Panel").

By a two to one decision filed June 27, 2000, this Hearing Panel reversed the District Court reasoning as follows:

> We accordingly conclude that the administrative claim filed in this case provided the Government with notice sufficient to evaluate its liability for damages. The Air Force was notified that a child suffering from numerous physical defects had been born in one of its base hospitals, and that these defects had allegedly resulted from the dispensing of

> Depo-Provera by one of its employees. At this point it was up to the Government to fully investigate the matter and fill in the details by asking the right questions beginning with, 'Were the risks of selecting Depo-Provero as a contraceptive reasonably and accurately explained to Sterling's Mother before we embarked on that course of treatment?' That the claim form contained a minor factual inaccuracy should not have deterred the Government from acting reasonably by dotting its I's and crossing its T's. (App. A at 19a-20a.)

Upon receiving this decision, the United States timely filed a Petition for Rehearing and Rehearing *en banc*. By Order filed September 8, 2000, this Petition for Rehearing *en banc* was granted and the case was calendared for oral argument before the *en banc* panel of the United States Court of Appeals for the Fourth Circuit. (*See*, App. C at 36a - 37a.)

On November 17, 2000, the Fourth Circuit entered a Summary Order set forth in Appendix B at pages 34a- 35a, which stated in pertinent part as follows:

> It is Ordered by virtue of an equally divided vote of the active members of the Court that the Judgment appealed from be, and it is hereby, affirmed. (App. B at 35a.)

In so doing, the Fourth Circuit vacated the Hearing Panel's majority opinion set forth in Appendix A at pages 1a through 24a.

It is respectfully submitted that this was error, and that this error should be corrected by this Court. In that regard, the Petitioners have timely filed a Petition for Writ of Certiorari with this Court within 90 days of the entry of the Court of Appeals Order of November 17, 2000, referenced above.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS MATTER, TO THE EFFECT THAT THE VERBIAGE OF THE PETITIONERS' ADMINISTRATIVE CLAIM UNDER THE FEDERAL TORT CLAIMS ACT, WAS NOT SUFFICIENTLY FACTUALLY DETAILED TO PRESERVE THEIR TORT CLAIM AGAINST THE UNITED STATES FOR MEDICAL MALPRACTICE BASED UPON FAILURE TO OBTAIN INFORMED CONSENT, IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, SECOND, FIFTH, SIXTH, EIGHTH, NINTH, ELEVENTH, AND D.C. CIRCUITS ON THIS SAME ISSUE OF THE SUFFICIENCY OF THE FACTUAL PREDICATE STATED IN AN ADMINISTRATIVE CLAIM FOR RELIEF UNDER THE FEDERAL TORT CLAIMS ACT.

The Fourth Circuit Court of Appeals' *Summary Order* in this case, which affirmed the lower Court's decision without opinion, has the effect of placing the Fourth Circuit in conflict with decisions of the First, Second, Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits on the same issue regarding the sufficiency of the factual predicate stated in an administrative claim for relief under the Federal Tort Claims Act, sufficient to confer jurisdiction on the United States District Court.

There are two distinct schools of jurisprudential thought on the subject of the sufficiency of the factual presentment required for an administrative claim under the Federal Tort Claims Act. One school of thought holds that as long there is sufficient written notice in the Administrative Claim Form 95, sufficient to enable the agency against whom the claim is made to investigate the claim and uncover all possible legal theories upon which any future lawsuit under the Tort Claims Act might be based, then the Administrative Claim is sufficient to confer subject matter jurisdiction on the United States District Court, for any such claim that may be raised in future litigation.

The Court of Appeals' Opinion that is most closely identified with this school of thought on the subject, is *Frantz v. United States*, 29 F.3d 222 (5th Cir. 1994).

There, the Appellant underwent nose surgery at a Veteran's Administration Hospital in Dallas, Texas. 29 F. 3223.

In connection with this surgery, he experienced a loss of vision in his left eye, which was found to have been caused by a central retinal artery occlusion, which caused permanent damage to the vision in his left eye. *Id.*

Frantz then attempted to obtain damages for this injury by filing an administrative claim under the Federal Tort Claims Act pursuant to 28 U.S.C. Section 2675 (a). (See, Page 2 of this Petition, *Supra*,.)

The Fifth Circuit Court of Appeals described this Administrative Claim as follows:

> The administrative claim provided the date, location and description of Mr. Frantz's injury. In response to the instructions to state the nature and extent of the injury and to provide a description of the accident, the Frantzes stated, "negligence in surgery causing blindness" and "negligence in nasal surgery on husband causing him to be blind." Moreover, the claim named "all medical personnel who cared for Chester Frantz" as potential witnesses. Finally, the Frantzes sought Two Million Dollars for the injury. 29 F.3d at 224.

After this Administrative Claim was denied, Frantz filed a lawsuit in the United States District Court alleging negligence in his care and treatment. In a third amended Complaint, Frantz additionally claimed that the Government failed to obtain informed consent from Frantz prior to the surgical procedure. 29 F.3d at 223.

The Government objected to the informed consent claim arguing that it was not properly presented in the Administrative Claim. The District Court agreed and dismissed the claim for lack of subject matter jurisdiction. 29 F.3d at 223.

In reversing this decision, the Fifth Circuit reasoned as follows:

> As a jurisdictional prerequisite to bringing a lawsuit under the Federal Tort Claims Act, a Plaintiff is required to "first [present his or her] claim to the appropriate Federal Agency. 28 U.S.C. Section 2675(a) . . . Section 2675(a) is satisfied therefore if the Claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate the claim and (2) places a value on his or her claim . . . This Court has not required Plaintiffs to specifically enumerate legal theories of recovery in their Administrative claims . . . The purpose of Section 2675 will be served as long as a claim brings to the government's attention facts sufficient to enable it thoroughly to investigate its potential liability and conduct settlement negotiations with the Claimant. *Accordingly, we think that if the government's investigation of [the Plaintiff's] claim should have revealed theories of liability other than those specifically enumerated therein, those theories can properly be considered part of the claim . . . The government's investigation of the Administrative claim should have revealed the possibility of an informed consent claim. Under Texas law, a suit for the failure of a doctor to fully inform a patient of the risks of surgery sounds in negligence . . . By its very nature, the informed consent claim is included in the Frantzes' allegation of negligence in their Administrative claim. We therefore hold*

> *that the Administrative claim provided the government with sufficient information to conduct a full investigation and to put it on notice of the possibility of the informed consent claim.* 29 F.3d 224-25. (Emphasis added.)

Basically then, the Court in *Frantz* held that a factual allegation of medical malpractice in an Administrative Claim Form 95, addressed to the appropriate agency, was notice to the agency sufficient to enable it to investigate the claim, and uncover any possible theories upon which the claim could be based, including the failure to obtain informed consent even though no informed consent language, direct or indirect, was used in the claim.

The Fifth Circuit's view in this regard, as enunciated by the Court in *Frantz*, has been accepted by the majority of the Circuit Courts of Appeal that have addressed the issue.

The Second Circuit did so in a case entitled *Johnson by Johnson v. United States,* 788 F.2d 845 (2nd Cir. 1986). There, the Plaintiff brought an Administrative Claim pursuant to the Federal Tort Claims Act against the United States Postal Service contending that the Postal Service was liable for sexual assaults committed against several children by one of its letter carrier employees.

This claim was denied and the Plaintiff filed suit in the U.S. District Court. The District Court dismissed the Plaintiff's claim ruling that the actions of the Postal Service employee were intentional acts, and therefore exempt from suit under the Federal Tort Claims Act. The Court further ruled that a claim for negligent supervision was not appropriately presented on the Plaintiff's Administrative

Claim, and therefore, the Court did not have subject matter jurisdiction to entertain it.

On Appeal, the Second Circuit reversed the District Court on the issue of the adequacy of the Administrative Claim reasoning as follows:

> Appellants contend that the Administrative claim filed with the Postal Service alleging only sexual assault and injury stemming from it was sufficient to enable them to maintain a Court action against the United States for negligent supervision . . . An Administrative claim need not meet formal pleading requirements. All that is necessary is that a claim be specific enough to serve the purposes intended by Congress in enacting Section 2675(a)-'to ease Court congestion and avoid unnecessary litigation while making it possible for the government to expedite the fair settlement of the tort claims asserted against the United States . . .' Toward this end, the government requires all claimants to submit standard Form 95, a one page claim form, requesting a description of the accident and the nature and extent of the injury. Appellants' Administrative claim met these requirements. *By stating the cause of injury, the name of the employee who committed the assault, and the date and location of the attack, the claim notified the agency of sufficient factual circumstances to enable it to investigate the matter. Although the claim supplied no facts evidencing negligent supervision and did not allege all the factual elements of such a theory*

> *of liability, a reasonably thorough investigation of the incident should have uncovered any pertinent information in the government's possession relating to the agency's knowledge or lack of knowledge of any prior sexual misconduct of its employee Ojeda* . . . . 788 F. 2d at 848-849. (Emphasis added.)

The Ninth Circuit embraced this school of thought in *Broudy v. United States*, 722 F.2d 566 (9th Cir. 1983). There, the widow of a United States Marine brought an Administrative Claim pursuant to Section 2675 (a), contending that he had suffered a service related injury, when he was exposed to above ground radiation testing while a member of the Marine Corp. This exposure resulted in his dying from a form of cancer related to radiation exposure. The Administrative Claim did not specifically mention any post service torts allegedly committed by the Government against the appellant's decedent.

Ultimately, the United States District Court dismissed the Plaintiff's claim, holding among other things, that because her Administrative Claim pursuant to Section 2675 (a), did not specify an independent post service tort, the District Court had no jurisdiction to entertain it when brought by the Appellant in her amended Complaint. 722 F.2d at 568. On Appeal, the Ninth Circuit reversed reasoning as follows:

> As a prerequisite to maintaining suit under the F.T.C.A., a Plaintiff must first present the claim to the appropriate Federal agency. After six months have passed or the agency has denied the claim, the Plaintiff may bring suit in Federal Court on the claim . . . Appellant's

> claim to the Department of Energy complied with the requirements of Section 2675(a) and 28 C.F.R. Section 14.2(a) as interpreted by this Court. Her claim states the location and date of the accident, the nature and extent of the injury, the dollar amount of the claim, and a description of how the accident occurred. Appellant's completed standard Form 95 gave the agency notice to commence investigation by providing information concerning the accident and injury. *The government however complains that the Appellant's Administrative claim does not refer to the separate post-service tort of the government's alleged failure to warn. We see nothing in Section 2675(a) or the regulations which require the claimant to state with great specificity the legal theories to be asserted in the eventual F.T.C.A. action . . . In addition, Appellant's legal theories are clearly set forth in her pleadings and are accessible to an interested government agency. Thus in keeping with the Congressional purpose of 'providing fair and equitable treatment of private individuals and claimants when they deal with the government, . . .' we hold that Appellant satisfied the requirements of Section 2675(a), and the accompanying regulations*. 722 F.2d at 568-69. (Emphasis added.)

The Eleventh Circuit Court of Appeals embraced this same school of thought in *Burchfield v. United States,* 168 F.3d 1252 (11th Cir. 1999), reasoning as follows:

> Congress . . . . enacted Section 2675 (a), not to place procedural hurdles before potential litigants, but to facilitate early disposition of claims . . . . We keep Section 2675 (a),'s underlying purpose in mind when considering the amount of information it requires from a potential litigant. We have held that a Claimant must give an Administrative agency only enough information to allow the agency to begin its own investigation of the alleged events and explore the possibilities of settlement . . . . We do not require the Claimant to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery . . . . or every factual detail that might be relevant . . . . In short, the amount of information required is "minimal" 168 F.3d at 1255.

The First Circuit Court of Appeals indicated its assent to this view in *Santiago-Ramirez v. Secretary of the Department of Defense,* 984 F.2d 16 (1st Cir. 1993), reasoning as follows:

> We understand a Plaintiff to have satisfied the notice requirement of Section 2675 if he or she provides a claim form or "other written notification" which includes (1) sufficient information for the agency to investigate the claims and (2) the amount of damages sought . . . . This Circuit approaches the notice requirement leniently, "recognizing that individuals wishing to sue the government must comply with the details of the law, but also keeping in mind that the law was not

> intended to put up a barrier of technicalities to defeat their claims." . . . A flexible approach to the notice requirement is in keeping with the original purpose behind the filing of an administrative claim: that of allowing the efficient investigation of the Claim by the agency without sacrificing the entitlement of a claimant to his or her cause of action against the government . . . . In the context of Section 2675, the emphasis is on the agencies' receipt of information: it must have enough information that it may reasonably begin an investigation of the claim. 984 F.2d at 19.

The D.C. Circuit Court of Appeals adopted a similar position in *GAF Corporation v. United States*, 818 F.2d 901 (D.C. Cir. 1987), reasoning as follows:

> Thus we hold with the Ninth Circuit and the majority of Appellant Courts to have considered the question that Section 2675 (a) requires a Claimant to file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim . . . notice of an injury will enable the agency to investigate and ascertain the strength of a claim; the sum certain statement of damages will enable it to determine whether settlement or negotiations to that end are desirable. A presentment of this character provides the agency all it needs and all to which it is statutorily entitled, to make final disposition of claims in accordance with Section 2675 (a). Claimants who discharge this

> obligation of notice have satisfied the jurisdictional requirements of the act, and, with the running of the six month period Congress has provided the agencies to make final disposition of claims presented, are entitled to file suit. 818 F.2d at 919-920.

This view has also been embraced by the Courts of Appeal in the Third, Sixth, and Eighth Circuits as well. *See, Tucker v. United States Postal Service,* 676 F.2d 954, 958-959 (3rd Cir. 1982), *Douglas v. United States,* 658 F.2d 445, 447 (6th Cir. 1981), *Farmer's State Savings Bank v. Farmer's Home Administration,* 866 F.2d 276, 277 (8th Cir. 1989).

The alternate view, accepted in the Seventh and Tenth Circuits, calls for a stricter interpretation of the factual predicate stated in Administrative Claim under the Federal Tort Claims Act, pursuant to the trained legal reader requirement.

The leading Court of Appeals' opinion embracing this approach, is a decision from the Seventh Circuit Court of Appeals entitled *Murrey v. United States,* 73 F.3d 1448 (7th Cir. 1996). There, the Court held that in order to state an appropriate factual predicate in an Administrative Claim under the Federal Tort Claims Act, the claim form must contain such facts as would enable a legally trained reader to infer from the language of the claim form alone, that a specific claim is potentially cognizable under the facts stated in the claim form. 73 F.3d at 1452-1453. In so doing, the Seventh Circuit specifically rejected the approach of the Fifth Circuit in *Frantz v. United States, Supra*, stating as follows: "We do not go so far as the Fifth Circuit, which in *Frantz v. United States* . . . . held that a claim of failure to obtain informed consent is implicit when the Administrative Claim alleges medical negligence and the investigation would turn up the facts showing that failure." 73 F.3d at 1453.

Only one other Circuit, the Tenth, has embraced this stricter school of thought regarding the interpretation of Administrative Claim forms under the Federal Tort Claims Act. *See*, *Bradley v. United States*, 951 F.2d 268, (10th Cir. 1991). ("Because the F.T.C.A., constitutes a waiver of the Government's sovereign immunity, the notice requirement established by the F.T.C.A., must be strictly construed . . . . ") By vacating the Opinion of the Hearing Panel Majority in this case, and affirming the decision of the trial Court, the Fourth Circuit, in effect, joined the minority view embraced by the Seventh and Tenth Circuits, without specifically saying so at the Appellant level.

The difference in the two approaches is clear. Under the majority view, typified by the Fifth Circuit's decision in *Frantz, Supra*, as long as there is sufficient information in the Administrative Claim to put the agency on notice that a claim is in fact being made, and to allow the agency to begin its investigation of that claim, then the presentment requirements of Section 2675 (a) are met, assuming a sum certain in actual damages is demanded as well.

The stricter view, embraced by the Seventh and Tenth Circuits, and, by implication, the Fourth Circuit, places the burden upon the Claimant to state enough facts to establish every part of every legal theory upon which the Claimant could seek to file suit in U.S. District Court, should the Administrative Claim be denied by the appropriate agency. Put another way, under this stricter view, a trained legal reader must be able to ascertain all claims later raised by the Claimant in a civil action under the Federal Tort Claims Act, from the factual statements set forth on the Form 95 itself, without resorting to any further investigation.

It is respectfully submitted that this constitutes a profound conflict among the Circuits on the vitally important issue of what constitutes an Administrative Claim factually sufficient to confer jurisdiction upon the United States District Court for Tort Claims against the Government under the Federal Tort Claims Act.

For this reason, it is respectfully submitted that Certiorari should be granted in this case, pursuant to the provisions of Supreme Court Rule 10 (a).

Upon this granting of Certiorari, this Court should reverse the Fourth Circuit's Summary Order in this matter of November 17, 2000, and remand this action for trial. In so doing, this Court should adopt as a national standard, the approach to adjudging the factual sufficiency of a claimant's administrative presentment under Section 2675(a) used by the Fifth Circuit in *Frantz* and by a majority of the other Circuit Courts of Appeal.

This Fifth Circuit approach is more logically consistent with the legislative history of Section 2675(a). The legislative history of Section 2675 (a) indicates that it was promulgated in order to ease Court congestion while making it possible for the Government to expedite the fair settlement of tort claims brought against the United States by being able to investigate them pre-suit. 1966 *United States Code Congressional and Administrative News* at 2515-2516. It was also instituted to . . . "provide more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." *Id.*

When a claim for medical negligence is stated in an administrative claim under Section 2675 (a), the Government is then on notice that medical malpractice is being alleged, and they then have the duty to investigate all facets of any potential medical malpractice claim arising out of the facts alleged, including that subset of medical malpractice claims known as informed consent claims. As the Hearing Panel noted:

> A diligent investigation of a medical negligence claim entails, at the very least, a general review of the patient's records with a special regard to the chain of events leading to the complained of injury. *Included within the chain of events as the Frantz Court noted are the circumstances underlying the patient's decision to embark on the particular course of treatment.* The overarching theme is the alleged negligence of the Government's employees, and it is of little moment that the instrument of the Plaintiff's misfortune can be found in the initiation, planning or execution of her therapy; regardless of which link proves defective, the chain of causation remains unbroken. (App. A at 13a-14a.) (Emphasis added.)

It is therefore respectfully submitted that the approach taken by the Fifth Circuit in *Frantz,* by the Hearing Panel majority in this case and by the Courts of Appeal in the First, Second, Third, Fifth, Sixth, Eighth, Ninth, Eleventh and D.C. Circuits that have followed it, is more in keeping with the purposes of Section 2675 (a), especially the purpose of "... provid[ing] more fair and equitable treatment of private individuals and claimants when they deal with the

Government or are involved in litigation with their Government." 1966 *United States Code Congressional and Administrative News* at 2515-2516.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WRONGLY DECIDES THE INSTANT CASE, IN THAT UNDER EITHER STANDARD OF ADJUDICATION OF ADMINISTRATIVE CLAIMS, THE UNITED STATES DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE PETITIONER'S CLAIM AGAINST THE UNITED STATES FOR MEDICAL MALPRACTICE BASED UPON FAILURE TO OBTAIN INFORMED CONSENT.

Under the laxer standard embraced by the Fifth Circuit in *Frantz, Supra*, the Fourth Circuit clearly erred in vacating the Hearing Panel's majority decision, and in affirming the United States District Court's decision, ruling that it did not have subject matter jurisdiction over the Petitioner's claim against the United States for medical malpractice based upon failure to obtain informed consent.

As the Fourth Circuit's Hearing Panel majority noted, this case is almost identical to *Frantz*. Here, as in *Frantz*, an administrative claim was filed pursuant to Section 2675 (a), which stated a claim for medical malpractice. Therefore, here as in *Frantz*, by its very nature, an informed consent claim is included in this medical malpractice claim. This is especially true given the fact that the State Law that was before the

Court in *Frantz* is almost identical on this issue to the State law that was before the Hearing Panel in this case.

In *Frantz*, the Fifth Circuit relied on a Texas Statue which brought medical malpractice claims and claims for failing to obtain informed consent into one. 29 F.3d at 224 (noting that under Texas law, a suit for the failure of doctor to fully inform a patient of the risks of surgery sounds in negligence).

The same is true under the applicable provisions of South Carolina law before the Court in this case.

Under South Carolina law, the Doctrine of Informed Consent applies to physicians and, pursuant to it, a physician must disclose to a patient all information that a reasonable medical practitioner would make under the same or similar circumstances. *Hook v. Rothstein*, 281 S.C. 541, 316 S.E. 2d 690, 695 and 698 (Ct. App. 1984) Cert. den'd. 283 S.C. 64, 320 S.E. 2d 35 (1984). The Court, in *Hook*, also noted as follows:

> *An informed consent action is no different from any other action for professional malpractice.* Underlying every medical malpractice action is the basic principal that the physician departed from a standard of reasonable medical care . . . *As in other cases involving medical malpractice, when a patient alleges that an unrevealed hazard has caused them injury, the jury must determine whether under the facts of the case, the physician departed from the standard of care of the reasonable practitioner.* 316 S.E. 2d at 696-97. (Emphasis added.)

Therefore, the state of Texas, by statue, stated that a claim for failure to give informed consent was in fact, a medical malpractice claim sounding in negligence. In South Carolina the same has been done by common law decision in *Hook v. Rothstein, Supra.*

The Hearing Panel majority noted as much when it stated " . . . . it is apparent that, in South Carolina, an informed consent claim is a specific subset of the larger universe of medical malpractice actions." (App. A at 15a.)

Therefore, the Administrative claim in this case put the Government on notice of a claim for medical negligence.

At this point, as the Hearing Panel majority noted, it was up to the Government to fully investigate the matter and fill in the details by asking the right questions beginning with "Were the risks of selecting Depo-Provera as a contraceptive reasonably and accurately explained to Sterling's Mother before we embarked on that course of treatment?" (App. A at 19a-20a.)

In other words, when the Government was placed on notice of a medical malpractice claim, it had a duty to investigate all possible theories under which such a medical malpractice claim could have proceeded, including the theory of informed consent. This is underscored by the fact that this basis of the claim was uncovered by an assistant U.S. attorney in a brief pre-answer Deposition of the Appellant, Martha Drew. (*See, e.g.* App. K at 134a.)

As the Hearing Panel majority noted, the fact that the Government did not ask these right questions, does not deprive the Appellants in this case of a Federal remedy for the alleged birth defects suffered by their child:

> The Government in this case was neither compelled by the Plaintiff's administrative claim to peruse "voluminous records", nor forced to engage in a scavenger hunt for bases of liability far afield from that easily gleaned from the factual predicate. The Government was, however, required to familiarize itself with the available records and conduct a reasonable investigation-one of adequate depth to ascertain the likely sources of its liability, if any. That it failed to do this in this case does not deprive the Plaintiffs of a Federal remedy. (App. A at 24a.)

Even under the trained legal reader standard, typified by the Seventh Circuit's decision in *Murrey, Supra,* the District Court in this case still had subject matter jurisdiction over the Petitioners' claim for medical malpractice against the United States, based upon an alleged failure to obtain informed consent.

As the Court in *Murrey* noted, if, from the factual statements in the Form 95 alone, a trained legal reader could reasonably infer the presence of an informed consent claim, then the District Court has jurisdiction over such a claim when it is brought after denial by the agency of the Administrative Claim. In fact, the Administrative Claim in this case which stated a total claim in the amount of actual damages of $15 million dollars, was required to be reviewed by a trained legal reader, pursuant to Justice Department regulations, and specifically 28 C.F.R. Section 14.5, which provides as follows:

> The authority to adjust, determine, compromise and settle a claim under the

> provisions of section 2672 of title 28 of the United States Code, shall, if the amount of a proposed compromise, settlement, or award exceeds $5,000.00, be exercised by the head of an agency or his designee only after review by a legal officer of the agency.

Upon review by a trained legal reader, the language set forth in Paragraph 8 of the Petitioner's Form 95 in this case, quite reasonably should have led such a trained legal reader to infer that a claim for medical malpractice based upon a failure to obtain informed consent was in fact there. This is because such a trained legal reader is chargeable with knowledge of the substantiative law of the state in which the alleged federal tort claim arose given the fact that actions under the FTCA apply the substantive tort law of the state in which they originate. In this case, that state is South Carolina and under South Carolina law informed consent claims are just another basic type of claim for medical negligence. *See, Hook v. Rothstein, Supra.* Therefore, when a trained legal reader familiar with South Carolina law reads language in a form 95, which states a claim for medical negligence, he or she reasonably should ask, was the claimant fully informed of the dangers of the procedure or the drugs that he or she claims were negligently administered and caused him or her damage? In other words, a claim for medical negligence should raise a question in the mind of a legal reader well versed in South Carolina medical negligence law as to whether or not informed consent was obtained.

Hence, construing the Petitioner's Form 95, under either the majority or minority view, the conclusion should be the same: that their factual predicate at Paragraph 8 of their Form 95 was sufficient to confer jurisdiction of the United States District Court to entertain their claim for medical malpractice based upon a failure to obtain informed consent.

CONCLUSION

For all of the reasons set forth above, a writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Fourth Circuit which vacated a majority decision of the Hearing Panel of that same court. Ultimately, that Summary Order of the Fourth Circuit should be reversed and this action should be remanded to the jurisdiction of the United States District Court for the District of South Carolina for trial.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Filed June 27, 2000]

No. 99-1009

STERLING DREW, a minor under the age of thirteen years, by guardian ad litem Martha Drew; MARTHA DREW; JEBEDIAH DREW,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Dennis W. Shedd, District Judge.
(CA-98-1817-3-19)

Argued: January 27, 2000

Decided: June 27, 2000

Before WILLIAMS, MICHAEL, and KING, Circuit Judges.

OPINION

KING, Circuit Judge:

The infant Sterling Drew ("Sterling") and his parents appeal the dismissal of their action under the Federal Tort Claims Act ("FTCA") for injuries allegedly caused by birth control medication administered by medical personnel of the United States Air Force. The district court decided that it lacked jurisdiction over the subject matter because the claim had not been properly exhausted, as required by the FTCA. More specifically, the court determined that the Drews' administrative claim failed to provide the Air Force with sufficient notice of its factual and legal bases. For tile reasons explained below, we vacate the dismissal and remand for further proceedings.

I.

A.

The plaintiffs filed suit against the Government, seeking damages for prenatal injuries to Sterling. These injuries were allegedly caused by the birth control drug Depo-Provera, which had been administered to Sterling's mother, Martha Drew, by physicians at Shaw Air Force Base in South Carolina. Mrs. Drew's husband, Jebediah, is an enlisted serviceman on active duty with the Air Force, and the family lives on the base.

In their initial complaint, the plaintiffs alleged that Mrs. Drew was negligently given Depo-Provera while she was pregnant with Sterling. The complaint alleged that, as a result, Sterling was born with physical malformations (including an imperforate anus and a ventricular septal defect in his heart), and he will continue to suffer from various other genetic and developmental disorders. The complaint sought compensation for Sterling for his injuries, and it also sought recovery by his parents of the expenses of Sterling's medical care.

In discovery, it developed that Mrs. Drew was not given Depo-Provera while pregnant, but rather became pregnant after she had been administered Depo-Provera, while the drug remained in her system. The plaintiffs thus amended their complaint to conform to the evidentiary record, asserting a cause of action for the negligent failure of Air Force medical personnel to obtain Mrs. Drew's informed consent prior to the administration of Depo-Provera.

Correspondingly, the Government moved to dismiss the amended complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Government contended that the district court lacked subject matter jurisdiction to entertain the informed-consent claim, asserting that it was not encompassed within the administrative claim filed with the Air Force, as required by 28 U.S.C. § 2675(a). The district court, on December 1, 1998, granted the Government's motion and dismissed the amended complaint with prejudice. It is from this dismissal order that the plaintiffs appeal.

B.

Between 1992 and 1995, Mrs. Drew became pregnant on five occasions while using traditional birth control medications. Of these five pregnancies, three resulted in live births and two terminated in miscarriages. After her fourth pregnancy, Mrs. Drew sought birth control counseling at Shaw Air Force Base. In the course of this counseling, Mrs. Drew was encouraged by various medical personnel at Shaw to use Depo-Provera as a means of birth control. According to her testimony, Mrs. Drew was advised by the medical personnel that Depo-Provera was one hundred percent effective in preventing live births. She was further told there was a mere one chance in one thousand that she might become pregnant while on Depo-Provera, and that if she did, the pregnancy would spontaneously abort.

Pursuant to this advice, Mrs. Drew consented to Depo-Provera therapy for birth control purposes. She received her first injection of Depo-Provera on July 28, 1994; a second injection on October 24, 1994; and a third injection on or about February 1, 1995. Despite this preventative regimen, Mrs. Drew again became pregnant, and she was so diagnosed at Shaw on May 30, 1995. Contrary to the representations made by the Government's medical personnel, the pregnancy did not spontaneously abort, but culminated in the birth of Sterling on December 30, 1995. The plaintiffs maintain that Sterling's myriad birth defects are the result of being exposed to Depo-Provera in utero.

On November 21, 1996, after Sterling was diagnosed with his multiple problems, the Drews filed a claim for damages with the Air Force, pursuant to the FTCA. This administrative claim, submitted on a Standard Form 95 ("SF-95"), alleged the following as its factual predicate:

> Spontaneous delivery of male infant with imperforate anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital. *Depo-Provera injection given to claimant in early pregnancy.*

J.A. 94 (emphasis added). Over a year later, on December 23, 1997, the claim was denied by the Air Force.

On June 22, 1998, the plaintiffs timely filed their complaint in the district court, seeking compensation from the Government for birth defects caused by Depo-Provera and asserting, in accordance with the administrative claim, that Mrs. Drew was given Depo-Provera while she was in fact pregnant with Sterling. Thereafter, on October 30, 1998, the plaintiffs amended the complaint to restate their claim for medical negligence as one based upon lack of informed consent.

II.

The FTCA prohibits the filing of a civil action against the Government unless the underlying claim is "first presented" to the appropriate federal agency and subsequently denied. 28 U.S.C. § 2675(a).[1]

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[1] The pertinent portion of the statute at issue provides as follows:

Where such a claim is not first presented to the appropriate agency, the district court must, pursuant to Fed. R. Civ. P. 12(b)(l), dismiss the action for want of subject matter jurisdiction. *See McNeil v. United States,* 508 U.S. 106 (1993) (upholding dismissal of suit against Government where plaintiff had not exhausted available administrative remedies); *see also Henderson v. United States,* 785 F.2d 121, 123 (4th Cir. 1986) (exhaustion requirements is "jurisdictional"). We review de novo the district court's determination that the plaintiffs failed to properly exhaust their claim under the FTCA. *Robb v. United States,* 80 F.3d 884, 887 (4th Cir. 1996).

III.

A.

1.

The plaintiffs rely on the principle that a district court is not divested of jurisdiction under the FTCA where the

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> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a) (emphasis added).

claim presented in court is "reasonably related" to the claim presented to the administrative agency. *See Harris v. United States*, 797 F. Supp. 91 (D.P.R. 1992). *Harris* involved the alleged assault and battery of two third-grade pupils by their teacher at an elementary school located on a naval base. The plaintiffs asserted in their administrative claim that the Government-run school was liable in a supervisory capacity for the torts of its employee; before the district court, however, the plaintiffs shifted gears a bit, alleging in their complaint that the school had breached an independent duty to protect its students.

In denying the Government's motion to dismiss, the district court observed:

> Although a filing of an administrative claim pursuant to 28 U.S.C. §2675(a) is a jurisdictional prerequisite to judicial action, its purpose is essentially to give notice to the Government, to conduct a meaningful investigation to adequately defend itself. It is not bound by the standards applicable to court proceedings.

Id. at 93 (footnote omitted). The court noted further that "the legal basis for relief need not be specified . . . and alternate theories of liability can be presented at judicial proceedings." *Id.* (citing *Broudy v. United States*, 722 F.2d 566, 568-69 (9th Cir. 1983), for the former proposition, and *Johnson by*

Johnson v. United States, 788 F.2d 845, 849 (2d Cir. 1986), for the latter).[2]

2.

In response, the Government reminds us that, although the FTCA is intended to waive the sovereign immunity of the United States, *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999), such a waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996) (citing cases). According to the Government, a strict construction of the FTCA behooves us to parse the plaintiffs' complaint to determine in what respect, if any, it deviates from their prior administrative claim; to the extent that the court pleadings arguably broaden the grounds for relief beyond those previously stated, the Government urges that we reject the corresponding claim as unexhausted.

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[2] In short, the essentials of a proper administrative claim are even less exacting than the liberal notice-pleading standards applicable to federal court complaints. *Johnson,* 788 F.2d at 848 ("[A]n administrative claim need not meet formal pleading requirements . . . ."); *Michels v. United States,* 815 F. Supp. 1244, 1257 n.16 (S.D. Iowa 1993) (citing *Johnson*); *Harris,* 797 F. Supp. at 93 (quoting *Johnson*).

B.

1.

We repudiate the notion that the validity of a judicial complaint under the FTCA depends on it having been cloned from its predecessor, the administrative claim. We instead agree with the *Harris* court that the proper focus is on whether the administrative claim affords the Government with adequate notice to properly investigate the underlying incident so that it may either reasonably assess its liability or competently defend itself. *See Ahmed v. United States,* 30 F.3d 514, 517 (4th Cir. 1994) ("Section 2675(a) of Title 28 and 28 C.F.R. § 14.2(a) require two elements for sufficient presentment of a claim to an agency: 1) written notice sufficient to cause the agency to investigate, and 2) a sum-certain value on the claim.") (citation omitted).[3]

Under the initial prong of the presentment requirement, then, the salient question is whether, in light of all the circumstances of a particular case, the notice afforded the Government by the claimant is sufficient. In *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400 (D.S.C. 1994), our distinguished colleague Judge Traxler accurately noted that "[t]he sufficiency of the notice requirement under § 2675(a) 'is more than a question of technical niceties.'" *Id.* at 409 (quoting *Keene Corp. v. United States*, 700 F.2d 836, 842 (2d Cir. 1983)). He elaborated:

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[3] In enacting Section 2675, Congress sought "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966) ("S. Rep."), *reprinted in* 1966 U.S.C.C.A.N. 2515, 2516. Section 2675's requirement that a claim be filed before instituting suit is designed to bring the claimants' allegations to the immediate attention of the relevant agency. The purpose of this notice is "to protect the [Government] from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit." S. Rep. at 7; 1966 U.S.C.C.A.N. at 2517.

> [N]otice must do more than cause "the government to sift through the record." Rather, notice must be sufficiently detailed so that the United States can "evaluate its exposure as far as liability is concerned." Therefore, in addition to requiring a sum certain, a claimant must provide a sufficient factual predicate so that his claim can be investigated.

Atlas Properties, 854 F. Supp. at 412 (quoting *Keene Corp.*, 700 F.2d at 842).[4]

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[4] Judge Traxler concluded that the sufficiency of the notice at issue (a series of letters between the plaintiff and the Environmental Protection Agency) was "a close question," but that the plaintiff's claim had not been exhausted in any event because of the failure of the second prong of the presentment requirement, *i.e.*, the omission from the correspondence of a demand for a sum certain as damages arising from the claim. *Atlas Properties*, 854 F. Supp. at 413.

2.

a.

We turn now to evaluate the circumstances of the case before us. We must determine whether the factual predicate alleged by the plaintiffs in their administrative claim afforded sufficient notice to the Government to investigate the underlying conduct, such that it could reasonably assess the extent of its liability vis-a-vis the complaint that was subsequently filed.[5]

In performing our evaluation, we find it helpful to first consider a hypothetical claim -- one very similar to the actual claim but with the last three words of the factual predicate omitted:

> Spontaneous delivery of male infant with imperforate anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital. Depo-Provera injection given to claimant.

The rationale for our approach is simple: if this hypothetical predicate -- consisting solely of facts that we must presume to be true -- is insufficient notice of an informed-consent claim, then the further assertion that the injection occurred "in early pregnancy," demonstrably incorrect, could not have remedied the deficiency. Only if the hypothetical predicate passes legal muster will we be constrained to examine whether the additional words "in early pregnancy" would somehow render it insufficient.

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[5] There is no question that the second prong of the presentment requirement was fulfilled here. The SF-95 filed by the Drews claims damages for personal injury in the amount of $15 million.

In *Frantz v. United States,* 29 F.3d 222 (5th Cir. 1994), the court of appeals addressed the district court's dismissal of an informed-consent claim that was nowhere explicitly mentioned in the SF-95, which merely alleged negligence in the care and treatment of the plaintiff at a Veterans Administration hospital. The Fifth Circuit nonetheless reversed, concluding that the notice afforded the Government was sufficient:

> The administrative claim provided the date, location, and description of Mr. Frantz's injury . . . . Moreover, the claim named "[a]ll medical personnel who cared for Chester Frantz" as potential witnesses . . . . *Furthermore, the Government's investigation of the administrative claim should have revealed the possibility of an informed consent claim.* Under Texas law, a suit for the failure of a doctor to fully inform a patient of the risks of surgery sounds in negligence . . . . *By its very nature, the informed consent claim is included in the Frantzes' allegation of negligence in their administrative claim.* We therefore hold that the administrative claim provided the Government with sufficient information to conduct *a full investigation* and to put it on notice of the possibility of the informed consent claim.

Id. at 224-25 (citations and footnotes omitted) (emphasis added). In essence, the Fifth Circuit held in *Frantz* that there is an obligation on the part of the Government to conduct a diligent investigation, once it has been notified that it may be liable for the acts of its employees.

We would be hard-pressed to disagree. The presentment requirement of the FTCA confers upon the Government an advantage that most prospective tort defendants lack: an opportunity for informal fact-gathering and deliberate reflection. Once suit has been filed and the battle joined, discovery proceeds within rigid parameters, and pensiveness is a luxury not easily indulged.

In recognition of this freedom from litigation by ambush on which Congress has conditioned the sovereign's waiver of immunity, it is incumbent upon the courts to encourage the sovereign's agents to proceed as its lawmakers have evidently intended. Liability in a given situation cannot be thoroughly and thoughtfully assessed without accurate and complete information; the Government must therefore be charged with the duty to reasonably pursue the relevant facts, rather than being permitted to fall back on a few typed sentences appearing on a pre-printed form.

A diligent investigation of a medical negligence claim entails, at the very least, a general review of the patient's records with especial regard to the chain of events leading to the complained-of injury. Included within that chain of events, as the *Frantz* court noted, are the circumstances underlying the patient's decision to embark on the particular course of treatment. The overarching theme is the alleged negligence of the Government's employees, and it is of little moment that the instrument of the patient's misfortune can be found in the initiation, planning, or execution of her therapy; regardless of which link proves defective, the chain of causation remains unbroken.

Hence, what might appear at first blush to be distinct claims are actually; little more than alternative legal theories applicable to the same set of operative facts, akin to the situation in *Harris,* discussed *supra* at Part III.A. 1. This is the import of the Fifth Circuit's observation, set forth above, that "[b]y its very nature," an informed-consent "claim" is included within a general allegation of negligent care and treatment. The plaintiff in *Frantz* claimed "negligence in surgery," the Texas courts had previously held that an informed-consent action sounds in negligence, and the Fifth Circuit declined to limit the words "in surgery" to the narrow procedure in which the treatment process culminated. *Frantz,* 29 F.3d at 224 & nn. 6-7.

South Carolina, like Texas, recognizes a cause of action for negligence where a physician fails to "inform a patient of the material risks inherent in a proposed treatment or procedure." *Hook v. Rothstein*, 316 S.E.2d 690, 698 (S.C. Ct. App.), *cert. denied,* 320 S.E.2d 35 (1984).[6] And South

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[6] The FTCA authorizes federal agency heads and the Attorney General (or her designee) to settle claims against the Government for money damages "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred[.]" 28 U.S.C. § 2672. Section 2674 confirms that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . . " An examination of the relevant state law, if any, is therefore necessary

Carolina, in the context of discussing the evidence that the plaintiff must adduce to prevail on an informed-consent claim, has acknowledged the relatedness between the various actions that might arise from the course of a patient's treatment:

> An informed consent action is no different from any other action for professional malpractice. Underlying every medical malpractice action is the basic principle that the physician departed from a standard of reasonable care . . . . Because the question of whether the physician has acted unreasonably often involves the exercise of medical judgment, we feel that, in most cases, expert medical testimony is just as necessary to establish negligence in failing adequately to disclose as it is to prove negligence in failing to treat or diagnose properly.

Hook, 316 S.E.2d at 696-97. From this discussion by the Court of Appeals of South Carolina in *Hook,* it is apparent that, in South Carolina, an informed-consent claim is a specific subset of the larger universe of "medical malpractice actions."

In our view, the hypothetical predicate gives notice of a "medical malpractice action," which includes the possibility of an informed-consent claim. As was the case in *Frantz,* the hypothetical claim describes the claimant's injuries and,

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to determine the extent of the Government's liability in a particular case.

elsewhere in the SF-95, specifies the date and place of their occurrence. Moreover, the hypothetical claim names as potential witnesses "[a]ll medical personnel related to this specific case," in a fashion nearly identical to the claim at issue in *Frantz*.

In light of the similarity of the hypothetical claim to the one at issue in *Frantz*, it should come as no surprise that our conclusion with respect to the former is the same as the Fifth Circuit's concerning the latter: the information contained within sufficed to compel the Government to thoroughly investigate the possibility that some or all of the claimant's injuries were attributable to an employee's breach of his duty to obtain the patient's informed consent.

b.

Of course, we are not dealing with a hypothetical claim in this case. We must therefore decide whether the additional, incorrect information actually alleged -- that Mrs. Drew was administered Depo-Provera "in early pregnancy" -- so narrowed the scope of a reasonable investigation that the Government may be said to have been without notice, and thus excused from failing to discover the essence of the plaintiffs' claim.

Although we can imagine a situation where a misstatement in an SF-95 could affirmatively mislead the Government such that an otherwise sufficient notice would be nullified, this is not one of those situations. The Government had complete access to Mrs. Drew's medical file at Shaw Air Force Base; those records reflected that Mrs. Drew had received her last injection of Depo-Provera weeks or months prior to Sterling's conception.[7]

Indeed, the Government was fully aware that Mrs. Drew could not have been given Depo-Provera during her pregnancy, as illustrated by the letter denying her administrative claim:

> There are several reasons for my denial. You allege that Mrs. Drew received an injection of Depo-Provera early in her pregnancy with Sterling Drew, which caused Sterling's birth defects. Sterling Drew was born on 29 December 1995 [sic]. The record clearly demonstrates that the last documented injection was given on 24 October 1994, more than 14 months prior to Sterling's birth. Even if we accept that the final injection was given on or about 1 February 1995, as Mrs. Drew asserts, that is still 11 months prior to Sterling's birth. *It does not appear possible that Mrs. Drew could have received an injection of Depo-Provera while she was pregnant with Sterling.*

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[7] According to Mrs. Drew's deposition testimony, she received a subsequent injection of Depo-Provera from the Shaw medical staff on or about February 1, 1995, see Part I-B, *supra,* but this instance is not documented in the hospital records. Assuming that Mrs. Drew's recollection is accurate, she still would have received her final treatment well before the onset of her pregnancy, which is acknowledged to have occurred in mid-to-late April.

> Injections of Depo-Provera are effective for contraception for at least 12 weeks. This makes it highly unlikely that Mrs. Drew received an injection on 1 or 2 February, as she claims. However, it is certainly possible, as with any contraceptive method, for the Depo-Provera to have failed to prevent pregnancy. This hardly amounts to evidence of negligence. It is also possible that if the Depo-Provera had been injected in early February, Sterling Drew may have been exposed to progesterone pre-natally. However, there is no scientific basis for attributing any of his developmental anomalies to intra-uterine hormone exposure. Thus, not only is there no evidence of negligence in the care rendered to Mrs. Drew, there is no evidence that any act or omission relative to her OB/GYN care causally contributed to Sterling's unfortunate conditions.

Letter from Major Eric S. Israel, Chief, Medical Law Branch, Tort Claims and Litigation Division, Air Force Legal Services Agency, to M.M. Weinberg, III, Attorney for the Drews (Dec. 23, 1997) (emphasis added).[8]

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[8] This letter was, rather inexplicably, omitted from the record below. At our request, counsel for the parties have provided us with a copy. Although our dissenting colleague chides us for taking note of the letter, *post* at 23, we refer to it primarily to demonstrate how far afield the Government's inquiry was from the crux of the claim ultimately asserted, a point on which there appears no dispute. We instead part ways with the dissent over the likely reason for the miscue: while we take Judge Williams to argue that the Government was affirmatively misled by the allegations of

The denial letter is interesting in several respects. First, there is no mention of any investigation concerning whether Mrs. Drew was properly informed of the risks of Depo-Provera therapy. Second, even if such an investigation had been undertaken, it is plain that the Government's position regarding its liability would not have been different, inasmuch as the letter contends that Sterling's injuries were not caused by exposure to Depo-Provera. Lastly, if Mrs. Drew's account of what she was told by the Shaw medical staff is believed, *i.e.*, that Depo-Provera was one hundred percent effective in preventing live births, the admissions contained in the last-quoted paragraph (not to mention Sterling's very existence) belie the reasonableness of that advice.

c.

We accordingly conclude that the administrative claim filed in this case provided the Government with notice sufficient to evaluate its liability for damages. The Air Force was notified that a child suffering from numerous physical defects had been born in one of its base hospitals, and that these defects had allegedly resulted from the dispensing of Depo-Provera by one of its employees. At this point, it was up to the Government to fully investigate the matter and fill in the details by asking the right questions, beginning with "Were the risks of selecting Depo-Provera as a contraceptive

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the administrative complaint, we believe that the Government simply failed at the threshold to undertake an adequate investigation. *See infra* Part III.B.2.c.

reasonably and accurately explained to Sterling's mother before we embarked on that course of treatment?" That the claim form contained a minor factual inaccuracy should not have deterred the Government from acting reasonably by dotting its "i"s and crossing its "t"s.[9]

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[9] The dissent, *post* at 23, is quick to point out that (1) the complaint initially filed in the district court did not plead the specifics of the informed-consent claim, inasmuch as its existence was not made plain until Mrs. Drew was deposed by the Government, *see supra at* 3; and (2) Mrs. Drew agreed to continue Depo-Provera therapy in February 1996, about six weeks after Sterling was born. Neither of these circumstances persuade us that we should reach a different result in this case.

Of course, anything that counsel for the Drews may (or may not) have known about the details of his clients' claims prior to filing suit is of secondary importance to what the Government was obliged to ascertain under the FTCA. Indeed, we daresay that had the Government asked Mrs. Drew the same questions in its initial investigation as it did during her deposition, there would have been little need to litigate the question of notice.

As for Mrs. Drew's continued use of Depo-Provera, the record does not reveal when she began to suspect that the drug may have caused Sterling's birth defects (though we can surmise that it was prior to her seeking the advice of counsel in August 1996, *see* J.A. 61). Any significance that might be ascribed to Mrs. Drew's actions in this regard, however, relates strictly to the merits of her informed-consent claim; it is wholly irrelevant to the discrete issue before us, *i.e.*, whether the claim may be properly alleged to begin with. In fact, although the dissent interprets Mrs. Drew's post-event use of Depo-Provera as evidence that she accepted the risks associated with the drug (thus relieving the Government of its burden to investigate this aspect of its treatment), it seems to us just as likely that her actions evidenced a misapprehension of the magnitude of those risks.

3.

We recognize that our decision today may be in some tension with that in *Murrey v. United States*, 73 F.3d 1448 (7th Cir. 1996). In *Murrey*, as in *Frantz* and this case, the Government argued for the dismissal of the plaintiff's informed-consent claim on the ground that it had not been alleged in the SF-95. Judge Posner began his analysis as follows:

> [T]o base a suit on lack of informed consent Murrey's estate was required to include, or at least to allude to, the issue of informed consent in the administrative claim. The statute requires a plaintiff to file his or her "claim" with the relevant agency . . . in layman's terms a legal basis for suit. The plaintiff has two such bases. The main one . . . is negligence in the treatment of Mr. Murrey when, on the morning following the operation, he began to hemorrhage internally. The subordinate one is the failure to obtain his informed consent to the operation. They are therefore separate claims within the meaning of the civil rules.

Murrey, 73 F.3d at 1451. Judge Posner acknowledged, however, that "the fact that failing to file a timely administrative claim has such a fell consequence argues for greater liberality in determining whether the administrative claim is adequate," *id.* at 1452, observing that "the claim encompasses any cause of action fairly implicit in the facts." *Id.* Judge Posner continued:

> We do not go so far as the Fifth Circuit, which in *Frantz v. United States* . . . held that a claim of failure to obtain informed consent is implicit when the administrative claim alleges medical negligence and investigation would turn up the facts showing that failure. We agree rather . . . that the administrative claim must narrate facts from which a legally trained reader would infer a failure to obtain informed consent.

Murrey, 73 F.3d at 1453.[10]

It is fair to say, based on Judge Posner's opinion in *Murrey*, that the Seventh Circuit, if faced with the question before us, would likely conclude that the notice submitted in this case was insufficient to confer jurisdiction on the district court over the Drews' informed-consent claim. To the extent that our sister circuit would require a more detailed exposition than we approve today, we respectfully disagree that such is necessary. We instead align ourselves with the view of the Fifth Circuit as set forth in *Frantz,* in agreement with the Eleventh Circuit's most recent pronouncement on the matter:

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[10] Judge Posner ultimately concluded that the required threshold had been met, noting that the document filed with the Department of Veterans Affairs included the following statement:

> On November 15, 1989, Tom [Murrey] entered the Veterans Hospital in North Chicago to undergo a radical prostatectomy. He was extremely fearful of this surgery. However, V.A. physicians assured him and his family that surgery was the only available therapy, and that it would extend his life by 15 years.

Murrey, 73 F.3d at 1452 (brackets in original).

> Congress . . . enacted section 2675(a) not to place procedural hurdles before potential litigants, but to facilitate early disposition of claims. . . . We keep section 2675(a)'s underlying purpose in mind when considering the amount of information it requires from a potential litigant. We have held that a claimant must give an administrative agency only enough information to allow the agency to "begin its own investigation" of the alleged events and explore the possibility of settlement. . . . We do not require the claimant to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery . . . or every factual detail that might be relevant . . . . In short, the amount of information required is "minimal."

Burchfield v. United States, 168 F.3d 1252, 1255 (llth Cir. 1999) (citations omitted). Mindful, however, that our decision today not be construed to effectively vitiate the notice prong of the FTCA's presentment requirement, we issue the same caveat as did the Eleventh Circuit:

> Our holding does not mean that agency investigations must go beyond the scope of the matters alleged in administrative claims. Section 2675(a) does not require an agency to undertake an independent search for injuries or

> theories of liability that are not closely related to the matters described in the claim . . . . Nor does our interpretation of the statute mean that an agency will be on notice of all the facts contained in voluminous records presented by a claimant, if the claimant has not pointed to specific sources of injury. . . . Finally, a claim may be so vague or lacking in detail that the agency cannot be expected to initiate any investigation at all.

Id. at 1256-57 (citations omitted).

The Government in this case was neither compelled by the plaintiffs' administrative claim to peruse "voluminous records," nor forced to engage in a scavenger hunt for bases of liability far afield from that easily gleaned from the factual predicate. The Government was, however, required to familiarize itself with the available records and conduct a reasonable investigation -- one of adequate depth to ascertain the likely sources of its liability, if any. That it failed to do so in this case does not deprive the plaintiffs of a federal remedy.

IV.

For the foregoing reasons, the judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED

WILLIAMS, Circuit Judge, dissenting:

"Depo-Provera injection given to claimant *in early pregnancy.*" The last three words of this statement clearly set forth the nature of the claimed injury -- medical negligence arising from the injection of Depo-Provera during early pregnancy. This statement is notable because of what it says, as well as what it does not say. Nowhere does it forecast a claim of informed consent arising from actions occurring well before conception. Indeed, the words "in early pregnancy" form the logical time frame for a reasonable investigation of the Drews' administrative claim, particularly once the investigation revealed the impossibility of the facts alleged in that claim.

Today, however, the majority fashions a rule under which an administrative claim constitutes sufficient notice under the FTCA even though it is only slightly related to -- and, indeed, offers a wholly different factual predicate than -- the actual claim asserted before the district court. The majority's rule is overly broad and inappropriate, both on the facts of this case and in its far-reaching implications. This rule also places an unreasonable burden of investigation upon the Government and encourages fishing expeditions for claimants to recover from the federal fisc. For these reasons, as well as those discussed below, I respectfully dissent.

I.

The starting point of the analysis is the claim itself, which, as noted above, contains three very important words: "in early pregnancy." The majority, as part of its analysis, hypothesizes that were it not for these three words, which it characterizes as "a minor factual inaccuracy," *ante* at 14, the administrative claim certainly would constitute sufficient notice to the Government of a potential informed consent claim. We need not deal with hypotheticals in this case, however, because the Drews' administrative claim speaks for itself.

Although an administrative claim need not enumerate each legal theory, it must, at least, provide sufficient information to enable the agency to conduct its own investigation. *See Ahmed v. United States,* 30 F.3d 514, 516-17 (4th Cir. 1994). Thus, "a claimant must . . . provide a sufficient factual predicate so that his claim can be investigated." *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.,* 854 F. Supp. 400, 412 (D.S.C. 1994) (Traxler, J.). In the present case, the Drews' administrative claim specifically alleged that Mrs. Drew was given Depo-Provera while she was pregnant. Consistent with their administrative claim, the Drews' initial complaint in district court alleged that "Depo-Provera injections were administered to the Plaintiff, Martha Drew . . . when [she] was *in fact pregnant.*" (J.A. at 7 (emphasis added).) Indeed, all of the allegations in the Drews' initial complaint relate specifically to the Government's alleged negligence in injecting Mrs. Drew with Depo-Provera during her pregnancy. In amending their complaint to focus upon conduct that occurred well before pregnancy, the Drews did not simply assert a different legal theory based upon facts already alleged in the administrative complaint. Instead, they created, essentially from thin air, a factual predicate entirely different than that originally asserted and investigated. The most crucial fact in the Drews' administrative complaint -- that Air Force medical personnel took the affirmative act of injecting Drew with Depo-Provera while she was already pregnant -- was entirely incorrect. Likewise, the most crucial fact in the Drews' informed consent claim -- that medical personnel negligently omitted to inform or misinformed her of the risks relating to future pregnancy while under Depo-Provera -- is not suggested, raised or alluded to in the administrative claim at all. As the Seventh Circuit noted in *Deloria v. Veterans Admin.*, 927 F.2d 1009 (7th Cir. 1991), "a plaintiff cannot present one claim to the agency and then maintain suit on the basis of a different set of facts." *Id.* at 1012 (internal quotation marks omitted).

II.

Adopting the broad rule of *Frantz v. United States*, 29 F.3d 222 (5th Cir. 1994), the majority appears to conclude that by asserting a claim of medical negligence, the Drews necessarily placed the Government on notice of an informed consent claim because informed consent is a subset of medical negligence under South Carolina law.[1] I cannot agree with the majority's reliance upon *Frantz,* which itself relies upon a questionable premise. It is true that under South Carolina law, similar to Texas law, a claim of informed consent is recognized as a subset of medical negligence theory. *See Hook v. Rothstein,* 316 S.E.2d 690, 696-97 (S.C. Ct. App. 1984). It does not follow, however, that every claim of medical negligence automatically includes or gives notice of an informed consent claim. *Cf Baxley v. Rosenblum,* 400 S.E.2d 502, 508 (S.C. Ct. App. 1991) (affirming trial court's refusal to allow Baxley to amend his pleadings to include an informed consent claim at the close of evidence at trial where Baxley only offered evidence and expert testimony relating to Dr. Rosen-blum's alleged failure properly to diagnose and treat Baxley's cancer).

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[1] In *Frantz v. United States*, 29 F.3d 222 (5th Cir. 1994), the Fifth Circuit addressed whether the Frantzes had sufficiently put the Government on notice of an informed consent claim that arose from negligent eye surgery. The Frantzes' administrative claim had asserted "negligence in surgery causing blindness" and "negligence in nasal surgery on husband causing him to be blind." *Id.* at 224. The court concluded that the Frantzes' claim provided sufficient facts because it "provided the date, location, and description of Mr. Frantz's injury," and listed as potential witnesses "[a]ll medical personnel who cared for" Mr. Frantz. *Id.* The court further reasoned that the Government's investigation of the negligence claim should have revealed the possibility of an informed consent claim because under Texas law, "a suit for the failure of a doctor to fully inform a patient of the risks of surgery sounds in negligence." *Id.* The court concluded therefore, that" [b]y its very nature, the informed consent claim is included in the Frantzes' allegation of negligence in their administrative claim." *Id.*

Instead, I am convinced that *Murrey v. United States,* 73 F.3d 1448 (7th Cir. 1996), provides the better rule. In *Murrey,* Judge Posner addressed whether an administrative claim asserting medical negligence during surgery gave sufficient notice of an informed consent claim. Even though the *Murrey* court recognized that informed consent is a species of negligence, it nevertheless observed that "to base a suit on lack of informed consent Murrey's estate was required to include, or at least to allude to, the issue of informed consent in the administrative claim." *Id.* at 1451. And, although the *Murrey* court concluded that the administrative claim provided sufficient facts to notify the Government of the informed consent claim,[2] it explicitly rejected *Frantz,* stating that "the administrative claim must narrate facts from which a legally trained reader would infer a failure to obtain informed consent." *Id.* at 1453; *see also Bush v. United States,* 703 F.2d 491,495 (11th Cir. 1983) (concluding that the district court lacked jurisdiction to consider informed consent claim because "[n]either the claim nor the attached medical evaluation contained any challenge to the consent form . . . . There was no allegation that the doctors failed to disclose the risks involved in the medical procedures. Thus, the V.A. was not properly apprised of its potential liability on this ground, and had no opportunity to investigate the claim." (footnote omitted)).[3]

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[2] In *Murrey v. United States,* 73 F.3d 1448 (7th Cir. 1996), unlike the present case, the administrative complaint gave clear notice of the informed consent claim. The administrative complaint in *Murrey* included an attachment that stated that Murrey

Here, unlike *Murrey,* there is absolutely no indication in the administrative complaint that Drew was asserting an

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was fearful of the surgery and that the doctors "assured him and his family that surgery was the only available therapy, and that it would extend his life by 15 years." *Id.* at 1452.

[3] The majority cites the Eleventh Circuit's more recent decision in *Burchfield v. United States,* 168 F.3d 1252 (11th Cir. 1999), in which the court stated that "[w]e do not require the claimant to provide the agency with a preview of his or her lawsuit by reciting every possible theory of recovery, or every factual detail that might be relevant. In short, the amount of information required is 'minimal.'" *Id.* at 1255 (internal citations omitted). Notably, the *Burchfield* court cited *Bush v. United States,* 703 F.2d 491 (11th Cir. 1983), among other cases, for the proposition that "[s]ection 2675(a) does not require an agency to undertake an independent search for injuries or theories of liability that are not *closely related* to the matters described in the claim." *Id.* at 1256 (emphasis added).

informed consent claim.[4] Indeed, the facts as alleged in the administrative complaint are inconsistent with such a claim because the duty of informed consent, as now alleged, would have arisen months before Mrs. Drew's pregnancy. There is no doubt that faced with these facts, the *Murrey* court would reach the opposite conclusion.[5]

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[4] *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400 (D.S.C. 1994.), an opinion written by then-district Judge Traxler, also sets forth standards that are inconsistent with the majority's decision. In *Atlas Properties,* Judge Traxler stated that § 2675(a)'s notice requirement "is more than a question of technical niceties." *Id.* at 409 (internal quotation marks omitted). He also clarified that

> notice must do more than cause "the government to sift through the record." Rather, notice must be sufficiently detailed so that the United States can "evaluate its exposure as far as liability is concerned." Therefore, in addition to requiring a sum certain, a claimant must also provide a sufficient factual predicate so that his claim can be investigated.

Id. at 412 (quoting *Keene Corp. v. United States,* 700 F.2d 836, 842 (2d Cir. 1983)) (internal citations omitted). Although the majority cites the standards set forth in *Atlas Properties,* it apparently finds no guidance in them because it fails to apply these standards to the present case. Had the majority applied these standards, its rationale would fail. The majority's decision effectively imposes upon the Government a duty to "sift through the record" in the face of an evolving factual predicate in order to anticipate facts that a plaintiff might have alleged, but did not. The majority's approach places too much of a burden upon the Government and gives too great a reward to a chameleon-like claimant.

[5] The majority characterizes the factual discrepancy between the administrative complaint and the Drews' informed consent claim as "a minor factual inaccuracy." *Ante* at 14. This

The rule of *Murrey,* and its emphasis on the legally trained reader, is particularly apt to the present facts. I find it particularly notable that the Drews' counsel, an experienced litigator in medical negligence law, was apparently unaware of the possibility that the Drews might have an informed consent claim based upon the facts as alleged in their administrative complaint. Only after discovery did Mrs. Drew completely change her version of the facts from those contained in the administrative complaint, prompting counsel to move in district court to amend the Drews' complaint to include the informed consent claim. Yet, the majority would inexplicably place the burden upon the Government to anticipate facts and theories that the Drews' own counsel could not.

Moreover, although the majority notes that "[t]he Government had complete access to Mrs. Drew's medical file at Shaw Air Force Base," *ante* at 12, these records contain an important fact that would have further deterred the Government from anticipating an informed consent claim from the administrative complaint -- Mrs. Drew took

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characterization might be true if the proper standard of measurement for the level of inaccuracy is the number of words rather than the meaning of those words. To the contrary, "a minor factual inaccuracy" might be alleging that a car is blue when in fact it is teal. The inaccuracy in this case, however, goes to the very factual basis upon which the Drews' newly asserted legal theory rests. Surely, there is more than a "minor" difference between an allegation that a doctor injected a contraceptive during pregnancy -- an affirmative act that, on its face, may be inappropriate and that itself suggests the basis of liability -- and an injection of a contraceptive months before pregnancy, when use of a contraceptive is generally appropriate, and where the basis of liability is not the use of the drug itself, but rather an omission that accompanies its injection.

additional doses of Depo-Provera after her child was born with a defect.[6] If the idea behind informed consent is that the injured party would not have taken the drug had she known about its risks, how can we expect the Government to forecast an informed consent claim in light of records that clearly show that Mrs. Drew continued to take the drug even after becoming aware of those risks?

III.

The majority also relies upon a letter from Major Eric S. Israel to the Drews' counsel denying the Drews' administrative claim. At the outset, I question the propriety of relying upon a letter that was never raised before the district court. *(See* Letter from the Drews' counsel to this Court of 2/1/00 supplying copy of the denial letter and stating that "[u]pon review of this matter and conferring with opposing counsel, it appears that [this letter] was not presented at the lower Court level, either on its own or as an Exhibit to any document that was filed which appears on the docket sheet"). I am unaware of any other instances where we have considered evidence on appeal that was not presented below. *See, e.g., United States v. Hastings,* 126 F.3d 310, 316 (4th Cir. 1997) (stating that the court of appeals should not consider evidence that was not presented to the district court). But, even ignoring the irregularity of considering this evidence, the denial letter does little to support the Drews' position. The letter does not disclose that the Government had any idea that informed consent would be an issue in this case.

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[6] Sterling Drew was born on December 30, 1995. On February 15, 1996, Mrs. Drew signed an informed consent form to receive additional injections of Depo-Provera.

To the contrary, the denial letter is more reasonably read as showing that the Government, quite sensibly, examined the records and concluded that the facts as alleged by the Drews in their administrative complaint could not be reconciled with reality, and, therefore, that the Drews' claim as alleged was meritless. *(See* Letter from Israel to the Drews of 12/23/97, at 1 ("It does not appear possible that Mrs. Drew could have received an injection of Depo-Provera while she was pregnant with Sterling.").) It is simply untenable to require the Government, in the face of wholly meritless assertions of fact, to envision unasserted facts under which a claimant could recover if the administrative claim were written differently.

IV.

In conclusion, although the majority asserts that its decision should not be read to "effectively vitiate the notice prong of the FI'CA's presentment requirement," *ante* at 17, this is exactly the effect of the rule that the majority adopts. The majority's approach to this case places an undue burden upon the Government to anticipate facts that a chameleon-like claimant might assert once the original set of facts becomes unsuitable. Because the facts underlying the Drews' informed consent claim are only slightly implicated by the facts as alleged in their administrative complaint, because even experienced medical malpractice counsel could not forecast an informed consent claim from the facts contained in the administrative complaint, because the better rule articulated in *Murrey* mandates the opposite result, and because the majority's decision, in effect, creates an exception to the notice requirement that wholly eviscerates the rule, I cannot agree with the majority's decision. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed November 17, 2000]

No. 99-1009
CA-98-1817-3-19

STERLING DREW, a minor under the age of thirteen years, by guardian ad litem Martha Drew; MARTHA DREW; JEBEDIAH DREW,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before WILKINSON, Chief Judge, and WIDENER, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges.

ORDER

This appeal having come on for oral argument before the en banc Court on October 31, 2000, pursuant to Order of September 8, 2000, by which the panel opinion of June 27, 2000, 217 F.3d 193, was vacated and en banc consideration was granted,

IT IS ORDERED, by virtue of an equally divided vote of the active members of the Court, that the judgment appealed from be, and it is hereby, AFFIRMED.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed September 8, 2000]

No. 99-1009
CA-98-1817-3-19

STERLING DREW, a minor under)
the age of thirteen years, by)
guardian ad litem Martha Drew;)
MARTHA DREW; JEBEDIAH)
DREW,)
Plaintiffs - Appellants,)
)
v.)
)
UNITED STATES OF AMERICA,)
Defendant - Appellee.)
)

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing en banc, IT IS ORDERED that rehearing en banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument on October 31, 2000. Within ten days of the date of this order, twenty (20) additional copies of appellant's brief, twenty (20) additional copies of appellee's brief, twenty (20) additional copies of the appellant's reply brief, if any, twenty (20) additional copies of amicus curiae brief, if any, and twenty (20) additional copies of any previously filed authorities pursuant to Rule 28(j), FRAP, shall be filed. Counsel for amicus parties, if any, must file a motion for leave to participate in oral argument should they wish to be heard at argument.

Appellants will file twenty (20) additional copies of the joint appendix.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed December 1, 1998]

C.A. No. 3:98-1817-19

STERLING DREW, a minor under the)
age of thirteen years, by guardian ad litem)
Martha Drew; **MARTHA DREW**;)
JEBEDIAH DREW,)
Plaintiffs - Appellants,)
)
v.)
)
THE UNITED STATES OF AMERICA,)
Defendant - Appellee.)
)

ORDER

This is a Federal Tort Claims Act ("FTCA") case. Plaintiffs filed an administrative claim and, subsequently, a medical malpractice complaint based on their specific contention that an agent of the United States administered a Depo Provera (birth control) injection to Martha Drew ("Martha") while she was pregnant with Sterling Drew

("Sterling"), and this injection caused Sterling to be born with birth defects.[1] However, contrary to this assertion, Martha testified in her deposition that she did not receive a Depo Provera injection while she was pregnant with Sterling. Martha stated instead that her claim is actually based on the fact that she became pregnant *after* receiving a Depo Provera injection. It is unclear why plaintiffs' original allegations differ significantly from her testimony.

Based on Martha's testimony, the United States moved for summary judgment. In response, plaintiffs moved to amend their complaint to conform their allegations to

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[1] In their administrative claim, plaintiffs set forth the basis of their claim:

> "Spontaneous delivery of male infant with imperforated anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital. *Depo-Provera injection given to claimant in early, pregnancy.*"

(emphasis added). In their original complaint and answers to Local Rule interrogatories, plaintiffs specifically asserted that United States personnel administered Depo Provera injections to Martha *while she was pregnant.*

Martha's testimony. The Court permitted the amendment.[2] Plaintiffs thereafter filed an amended complaint setting forth causes of action under an informed consent theory.

This case is now before the Court on the United States' amended motion to dismiss or, alternatively, for summary judment. The United States contends that the Court lacks subject-matter jurisdiction over the informed consent claims in the amended complaint because plaintiffs did not file an administrative claim regarding those claims. *See* 28 U.S.C. § 2675(a). [3]Plaintiffs argue in opposition that their administrative claim provided sufficient notice to the United States to satisfy the FTCA's jurisdictional requirements.

The Court will grant the motion. Although plaintiffs clearly stated facts in their administrative claim that placed the United States on notice that they were pursuing a medical malpractice claim, they expressly based their claim on the

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[2] The United States responded to the motion to amend by stating that while it had no objection to allowing plaintiffs to amend, it intended to contest whether the Court has subject-matter jurisdiction over the amended complaint. Although the Court permitted the amendment, it expressly indicated that it was not reaching any opinion on the jurisdictional issue identified by the United States.

[3] Section 2875(a) provides in pertinent part: "An action shall not be instituted upon a claim against the United States for money damages for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."

United States' alleged improper administering of Depo Provera to Martha while she was pregnant. Plaintiffs thereafter filed this lawsuit based on that specific allegation. Of course, that allegation has now been discredited by Martha's own testimony. Only after Martha testified did plaintiffs first raise, or even appear to be aware of, their informed consent claim. In this regard, plaintiffs seek to impose an undue burden on the United States. On the one hand, they believed as late as the time they filed this lawsuit that their claims were based on Martha receiving a Depo Provera injection while she was preg-nant. On the other hand, they now argue that *despite their own lack of knowledge,* the United States was placed on notice of the true nature of their claims earlier when they filed the administrative claim. Under the circumstances of this case, the Court cannot conclude that plaintiffs' administrative claim is sufficient to provide the Court with jurisdiction over the informed consent claims.[4]

Based on the foregoing, the Court hereby **ORDERS** on this the 30th day of November, 1998, at Columbia, South Carolina, that the motion to dismiss be **GRANTED**.

/s/________________________
DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

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[4] *See, e.g., Bush v. United States*, 703 F.2d 491,495 (11th Cir. 1983) (district court lacked jurisdiction over FTCA informed consent cause of action which was not set forth in administrative claim).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

[Filed November 25, 1998]

C/A No. 3:98-1817-19

Sterling Drew, a minor under the age of thirteen years, by Guardian ad Litem Martha Drew and Martha and Jebediah Drew Personally,
Plaintiffs - Appellants,

v.

THE UNITED STATES OF AMERICA,
Defendant - Appellee.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGEMENT

INTRODUCTION

By their original Complaint in this action, the Plaintiffs alleged that the Plaintiff Martha Drew was given Depo-Provera as a birth control device by the Defendant, acting through its agents and servants including its duly constituted agency, the Department of the Air Force when the Plaintiff Martha Drew was in fact pregnant with the minor, Sterling Drew.

This Complaint went on to allege that as a direct and proximate result of these delicts, the Plaintiff, Sterling Drew, suffered grievous and permanent physical injury including, but not limited to, an imperforate anus, and a ventricular septal defect in his heart together with genetic, developmental, glandular and mental disorders as well as other damages. The Complaint also alleged a cause of action for the Plaintiffs Jebediah and Martha Drew, seeking recovery for the minor Plaintiff, Sterling Drew's, medical bills related to these problems, as the minor's parents.

On September 4, 1998, the deposition of the Plaintiff Martha Drew was taken by stipulation of the parties.

In this deposition, she testified that her complaint was not that she was given Depo-Provera while pregnant, but rather, that she became pregnant when she should not have because she was using Depo-Provera. (Martha Drew deposition at page 39, lines 1-9).

In light of this testimony, together with other deposition testimony of the Plaintiff quoted more fully below, the Plaintiffs moved to amend their Complaint to conform to this evidentiary record and state a cause of action based upon failure of the Defendant acting through its agents and servants in the Department of the Air Force to obtain the Plaintiff Martha Drew's informed consent prior to the administration of Depo-Provera. The particulars of this claim are set forth more fully in the Amended Complaint, and are discussed more fully below.

This Motion to Amend was granted by order entered on 10/15/98, and leave to file the Amended Complaint was reaffirmed by Summary Order of the Court entered on 10/29/98.

The Defendant has moved to dismiss this Amended Complaint, contending that the Court lacks subject matter jurisdiction to entertain the Plaintiff's informed consent claim, claiming that it was not properly presented at the Administrative level pursuant to 28 U.S.C. SECTION 2675(a).

It is respectfully submitted that this Motion should be denied.

LEGAL ISSUES AND DISCUSSION

THE DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED IN THAT THE DISTRICT COURT RETAINS SUBJECT MATTER JURISDICTION OVER THE ALLEGATIONS OF THE AMENDED COMPLAINT.

The original Complaint of the Plaintiffs contends that the Plaintiff, Martha Drew, received an injection of Depo-Provera while she was, in fact, pregnant with the minor Plaintiff, Sterling Drew, and as a result thereof, the minor Plaintiff Sterling Drew was born with several birth defects which are enumerated in paragraph 11, of the amended

Complaint. The Plaintiffs seek damages for the minor Plaintiff, Sterling Drew, and in their second cause of action, for his parents, Jebediah and Martha Drew, for the medical expenses which have been and which will be incurred for the treatment of the problems and damages suffered by Sterling Drew.

In her deposition which was taken by stipulation of the parties in this case on September 4, 1998, Martha Drew testified as follows:

> Q. Your Complaint is not that they gave you a shot while you were pregnant. Is it your testimony that they did not give you a shot while you were pregnant with Sterling.
>
> A. Yes.
>
> Q. But rather that you became pregnant when you should not have because you were using Depo-Provera. Is that your testimony?
>
> A. Yes, it is.
>
> (Deposition of Martha Drew at page 39, lines 1-9)

The Plaintiff also testified in this deposition that she was mislead as to the effectiveness of Depo-Provera, and was given Depo-Provera without her informed consent as follows:

> Q. When you were told about the risks of Depo-Provera -- let me ask you this: Why did you decide to choose Depo-Provera as a birth control device?

A. Because I originally wanted to have my tubes tied, and I was told that Depo-Provera would be the next most effective thing to having your tubes tied.

Q. What were you led to believe about the effectiveness of Depo-Provera and by who?

A. Captain Miller told me that here was a 99.9 percent effectiveness rate. In other works, it's like .1 percent that you would get pregnant and there is not at all any percent that the baby would survive.

Q. Tell me what you mean by that, not at all percent that the baby would survive.

A. That if there is that .1 that you do get pregnant, the you would have a miscarriage. The baby would die.

Q. So as far as live birth is concerned, you were told that the Depo-Provera was a hundred percent effective, right?

A. Right, yes.

Q. And why didn't you get your tubes tied?

A. Because they told me that I needed to either be 25 or have three children.

Q. How old were you at the time?

A. I was 20.

> Q. How old are you now?
>
> A. Twenty-four.
>
> (Martha Drew Deposition at page 47, lines 10-25, page 48, lines 1-15)

She also testified as follows:

> Q. . . .Okay. I think I'm understanding now. What you're saying is that you were using Depo-Provera as you sole birth control method and you became pregnant?
>
> A. Yes.
>
> Q. That it didn't work?
>
> A. Yes.
>
> Q. It did not work?
>
> A. Yes.
>
> (Martha Drew Deposition at page 50, lines 20-25, page 51, lines 1-3)

This testimony, gives rise to the allegations of the Plaintiffs' Amended Complaint to the effect that the Plaintiff Martha Drew was given the drug Depo-Provera without her informed consent, because she was misled as to its effectiveness in preventing live births.

Therefore, her claim is one based upon failure to give informed consent as required by South Carolina law. In that regard, the Memorandum of the Defendant in support of its Motion to Dismiss mischaracterizes the Plaintiff's claim as one for wrongful birth. (See, Memorandum of Defendant in Support of Motion to Dismiss at page 3, n. 2). This is an erroneous characterization of the claim stated by the Plaintiffs in their Amended Complaint. Rather, they contend that the Plaintiff Martha Drew was given Depo-Provera without her informed consent, which resulted in the injuries to the minor child and the expenses incurred by the adult Plaintiffs in this case, as alleged in the Amended Complaint.

Stated another way, Martha Drew was told, according to her testimony, that Depo-Provera was 100% effective in preventing live births. There was a .1 percent chance of getting pregnant, but even if she did get pregnant, the fetus would spontaneously abort prior to viability according to what the Defendant told her.

This was not true, and as a result, she was given Depo-Provera based upon misleading information and therefore without her informed consent. As a result of this, she became pregnant with the minor Plaintiff, Sterling Drew, while the Depo-Provera was still in her system, which in turn resulted in the damages to Sterling Drew, and to herself and to her husband as Sterling Drew's parents.

Under South Carolina Law, the doctrine of informed consent applies to physicians, and pursuant to it, a physician must disclose to a patient all information that a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances. Hook vs.

Rothstein, 281 S.C. 541, 316 S.E. 2d 690, 695 and 698 (Ct. App. 1984) cert. den'd. 283 S.C. 64, 320 S.E. 2d 35 (1984).

It is submitted that it will be an issue for the Court sitting as the trier of fact in this case to determine whether or not Ms. Drew was, in fact, mislead by false information concerning the effectiveness of Depo-Provera to the point that her informed consent was vitiated. It is further submitted that it will be an issue for the Court sitting as the trier of fact, as to whether the information concerning the effectiveness of Depo-Provera concerned communications that a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances. Hook, supra, 316 S.E. 2d at 698.

In its Memorandum in Support of its Motion to Dismiss, the Defendant argues that the Court lacks subject matter jurisdiction to hear and decide this informed consent claim on its merits because it was not adequately presented in the administrative claim previously filed in this case.

The gravamen of the Defendant's motion is that because precise informed consent language was not used in the administrative claim submitted to the Department of the Air Force in this case, the Court is now without jurisdiction to hear the claims and causes of action set forth in the amended complaint.

This position is erroneous.

It appears to be well settled that a failure to raise a claim at the administrative level, does not divest the District Court of jurisdiction to entertain that claim under the Federal

Tort Claims Act where the claim that the Plaintiffs attempt to present at the District Court level was reasonably related to assertions presented to the administrative agency. See Harris vs. United States, 797 F. Supp. 91 (D.P.R. 1992). The Harris Court went on to reason as follows:

> Although a filing of an administrative claim pursuant to 28 U.S.C SECTION 2675(a) is a jurisdictional prerequisite to judicial action, its purpose is essentially to give notice to the Government, to conduct a meaningful investigation to adequately defend itself. It is not bound by the standards applicable to court proceedings. [A]n administrative claim need not meet formal pleading requirements. All that is necessary is that a claim be specific enough to serve the purposes intended by Congress in enacting SECTION 2675(a)-- "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." Johnson by Johnson v. United States, 788 F. 2d 845, 848-49 (2nd Cir. 1986). . . All that is required is notice of the incident and a demand for a sum certain, Avery v. United States, 680 F. 2d 608 (9th Cir. 1982). The legal basis for relief need not be specified, Broudy v. United States, 722 F. 2d 566, 568-69 (9th Cir. 1983) and alternate theories of liability can be presented at judicial prooceedings. Johnson, 788 F. 2d at 849.

797 F. Supp at 93. (Emphasis added and in the original).

Hence, the key issue in a situation such as this is notice and if the administrative agency was reasonably placed on notice by the administrative claim as to the nature of the Plaintiffs' claim, and the same result: a baby born with birth defects as a result of being exposed to Depo-Provera in utero.

In that both of these claims involve medical negligence, the administration of the same substance, and the same outcome, it is submitted that they are reasonably related to the point that this Court does have jurisdiction to hear this case on its merits.

A situation similar to the instant case was faced by the United States Court of Appeals for the Fifth Circuit in Frantz v. United States, 29 F. 3d 222 (5th Cir. 1994).

There, the District Court dismissed the Plaintiff's informed consent claim, holding that the Plaintiff did not present that claim at the Administrative level pursuant to 28 U.S.C. SECTION 2675 (a) .

On appeal, the Fifth Circuit reversed holding that the Plaintiff's stated claim for medical malpractice was sufficient to give the Court jurisdiction to entertain the Plaintiff's informed consent claim on its merits. In so doing, the Court reasoned as follows:

> As a jurisdictional prerequisite to bringing a lawsuit under the Federal Tort Claims Act, a Plaintiff is required to "first [present his or her] claim to the appropriate Federal Agency.

28 U.S.C. SECTION 2675(a) . . . Section 2675(a) is satisfied therefore if the Claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate the claim and (2) places a value on his or her claim. . .This Court has not required Plaintiffs to specifically enumerate legal theories of recovery in their Administrative claims. . .The purpose of Section 2675 will be served as long as a claim brings to the government's attention facts sufficient to enable it thoroughly to investigate its potential liability and conduct settlement negotiations with the Claimant. Accordingly, we think that if the government's investigation of [the Plaintiff's] claim should have revealed theories of liability other than those specifically enumerated therein, those theories can properly be considered part of the claim. . . The government's investigation of the Administrative claim should have revealed the possibility of an informed consent claim. Under Texas law, a suit for the failure of a doctor to fully inform a patient of the risks of surgery sounds in negligence. . .By its very nature, the informed consent claim is included in the Frantzes' allegation of negligence in their Administrative claim. We therefore hold that the Administrative claim provided the government with sufficient information to conduct a full investigation and to put it on notice of the possibility of the informed

> consent claim. 29 F. 3d 224-25. (Emphasis added).

This case is almost identical to Frantz. Here, an Administrative claim was stated for medical malpractice pursuant to Section 2675(a) . Therefore, by its very nature, an informed consent claim is included in this medical malpractice claim because under South Carolina law as well, a suit for the failure of a doctor to fully inform a patient of the risks of a certain medical procedure sounds in negligence. Hook v. Rothstein, supra, 316 S.E. 2d at 696-97.

In its Memorandum in Support of its Motion to Dismiss, the Defendant attempts to distinguish Frantz by noting that the Fifth Circuit relied on a Texas statute which brought medical malpractice claims and claims for failing to obtain informed consent into one. (See, Defendant's Memorandum at page 6, n. 3).

South Carolina has done the same by common law.

In the decision that recognized a cause of action for failure to obtain informed consent, Hook v. Rothstein, supra, the South Carolina Court of Appeals noted as follows:

> An informed consent action is no different from any other action for professional malpractice. Underlying every medical malpractice action is the basic principal that the physician departed from a standard of reasonable medical care. . . As in other cases involving medical malpractice, when a patient alleges that an unrevealed hazard has caused

> them injury the jury must determine whether under the facts of the case, the physician has departed from the standard of care of the reasonable practitioner. 316 S.E. 2d at 696-97 (Emphasis added).

Put another way, the State of Texas, by statute, stated that a claim for failure to give informed consent was in fact a medical malpractice claim sounding in negligence. In South Carolina, the same has been done by common law decision in Hook v. Rothstein, supra. Therefore, here as in Frantz, the Court is faced with state law which brings medical malpractice claims and claims for failing to obtain informed consent into one. Thus, the Administrative claim of the Plaintiffs complies with Section 2675(a), and this Court therefore has jurisdiction to entertain the Plaintiff's informed consent claim on its merits. For this reason, the Motion to Dismiss should be denied. Accord: Rise v. United States, 630 F.2d 1068 (5th Cir. 1980).

A situation analogous to this one was faced by the Ninth Circuit in Broudy v. United States, 722 F. 2d 566 (9th Cir. 1983). There, the widow of a United States Marine brought an Administrative claim pursuant to Section 2675(a), contending that he had suffered a service related injury, when he was exposed to above ground radiation testing while a member of the Marine Corps. This exposure resulted in his dying from a form of cancer related to radiation exposure. The Administrative claim did not specifically mention any post-service torts allegedly committed by the government against the Appellant's decedent.

After a flurry of litigation, including an interlocutory appeal to the Ninth Circuit (See, Broudy v. United States, [Broudy I] 661 F. 2d 125 (9th Cir. 1981)), the United States District Court ultimately dismissed the Appellant's claim holding, among other things, that because her Administrative claim pursuant to Section 2675(a), did not specify an independent post-service tort, the District Court had no jurisdiction to entertain it when brought by the Appellant in her Amended Complaint. 722 F. 2d at 568.

On appeal in Broudy II, the Ninth Circuit reversed reasoning as follows:

> As a prerequisite to maintaining suit under the F.T.C.A., a Plaintiff must first present the claim to the appropriate Federal agency. After six months have passed or the agency has denied the claim, the Plaintiff may bring suit in Federal Court on the claim. . .Appellant's claim to the Department of Energy complied with the requirements of Section 2675(a) and 28 CFR Section 14.2(a) as interpreted by this Court. Her claim states the location and date of the accident, the nature and extent of the injury, the dollar amount of the claim, and a description of how the accident occurred. Appellant's completed standard Form 95 gave the agency notice to commence investigation by providing information concerning the accident and injury. The government however complains that the Appellant's Administrative claim does not refer to the separate post-service tort of the government's alleged failure

> to warn. We see nothing in Section 2675(a) or the regulations which require the claimant to state with great specificity the legal theories to be asserted in the eventual F.T.C.A. action. . . In addition. Appellant's legal theories are clearly set forth in her pleadings and are accessible to an interested government agency. Thus in keeping with the Congressional purpose of "providing fair and equitable treatment of private individuals and claimants when they deal with the government, . . ." we hold that Appellant satisfied the requirements of Section 2675(a), and the accompanying regulations. 722 F. 2d at 568-69. (Emphasis added.)

In Broudy, the Court in essence held that the statement of a negligence claim at the Administrative level was sufficient to put the government on notice that there is also a claim embodied therein for failure to warn of the danger brought about by the negligent conduct.

That is the case here. The Plaintiffs' Administrative claim contends that the Defendant committed medical negligence in the administration to the Plaintiff Martha Drew of Depo-Provera.

Therefore, a claim based upon a negligent failure to warn of the dangers of Depo-Provera and in fact, the giving of misinformation regarding its effectiveness, is also embodied in those basic allegations of negligence contained in the Administrative claim.

For this reason also, the government's Motion should be denied.

The Second Circuit dealt with an issue similar to this one in Johnson by Johnson v. United States, 788 F. 2d. 845 (2nd Cir. 1986).

There, the Plaintiffs brought an Administrative claim pursuant to the Federal Tort Claims Act against the United States Postal Service, contending that the Postal Service was liable for sexual assaults committed against several children by one of its letter carrier employees.

This claim was denied and the Appellant filed suit in U. S. District Court. The District Court dismissed the Appellant's claim ruling that the actions of the Postal Service employee were intentional acts, and therefore exempt from suit under the Federal Tort Claims Act, and further, that a claim for negligent supervision was not appropriately presented on the Plaintiff's Administrative claim, and therefore, the Court did not have subject matter jurisdiction to entertain this claim.

On appeal, the Second Circuit reversed the District Court on the issue of the adequacy of the Administrative claim reasoning as follows:

> Appellants contend that the Administrative claim filed with the Postal Service alleging only sexual assault and injury stemming from it was sufficient to enable them to maintain a Court action against the United States for negligent supervision. . .An Administrative

> claim need not meet formal pleading requirements. All that is necessary is that a claim be specific enough to serve the purposes intended by Congress in enacting Section 2675(a)-"to ease Court congestion and avoid unnecessary litigation while making it possible for the government to expedite the fair settlement of the tort claims asserted against the United States. . ." Toward this end, the government requires all claimants to submit standard Form 95, a one page claim form, requesting a description of the accident and the nature and extent of the injury. Appellants' Administrative claim met these requirements. By stating the cause of injury, the name of the employee who committed the assault, and the date and location of the attack, the claim notified the agency of sufficient factual circumstances to enable it to investigate the matter. Although the claim supplied no facts evidencing negligent supervision and did not allege all the factual elements of such a theory of liability, a reasonably thorough investigation of the incident should have uncovered any pertinent information in the government's possession relating to the agency's knowledge or lack of knowledge of any prior sexual misconduct of its employee Ojeda. . . 788 F. 2d at 848-49. (Emphasis added.)

Here, as in Johnson, the Plaintiff's Administrative claim did not allege an informed consent theory of liability per se. However, a reasonably thorough investigation of the incident alleged in the Administrative claim should have uncovered any pertinent information in the government's possession relating to what consent was obtained, and the information given prior to the obtaining of that consent.

Therefore, here as in Johnson, the Court retains subject matter jurisdiction to hear this case.

In summary, if a claimant gives notice of the manner and general circumstances of the injury and the harm suffered in a sum certain representing the damages, then the claimant has complied with Section 2675(a) regarding the adequacy of the Administrative claim sufficient to confer subject matter jurisdiction on the District Court when and if that claim is denied and suit is filed. See, Avery v. United States, 680 F. 2d 608, 611 (9th Cir. 1982).

CONCLUSION

This Court does, in fact, have jurisdiction over the allegations of the amended complaint. This is because the claim that the Plaintiffs present in that amended pleading is reasonably related to the claim that they presented at the administrative level.

For this reason, it is respectfully submitted that the Defendant's motion to dismiss should be denied.

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

[Filed November 12, 1998]

Civil Action No. 3:98-1817-19

Sterling Drew, a minor under the age thirteen years, by his Guardian ad Litem Martha Drew and Martha and Jebediah Drew,
Plaintiff,

v.

United States of America,
Defendant.

AMENDED MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

OVERVIEW OF THE CASE

On October 15, 1998, this Court issued an Order granting Plaintiffs' motion to file an amended complaint. The

Order required the Plaintiffs to file and serve the amended complaint" no later than October 26, 1998." The Order further directed to Clerk of Court to moot the summary judgment motion of the United States without further Order of the Court if the Plaintiffs filed the amended complaint without further order of the Court. If, however, the Plaintiffs failed to "file and serve the amended complaint by October, 26 the Court will consider the summary judgment motion."

Plaintiffs' attorney mailed the amended complaint to the Clerk of Court and to the United States Attorney's office on October 26, 1998. The United States Attorney's office received[1] the amended complaint on October 27, 1998. On October 28, 1998, Plaintiffs' counsel filed a "Motion for Leave to File Amended Complaint" and attached an affidavit of counsel. This Court granted that motion on October 29, 1998. The United States offers this memorandum in support of the United States' motion to dismiss and alternatively for summary judgment.

FACTS

Attached as Exhibit 1 to this memorandum is a copy of the administrative complaint filed by Plaintiffs. The administrative complaint alleges as follows:

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[1] The United States does not have information as to when the clerk's office received the amended complaint for filing, but upon information, the United States believes that the clerk's office received the amended complaint on October 27, 1998, the same day it was received by the United States Attorney's Office.

> Spontaneous delivery of male infant with imperforated anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital. Depo-Provera injection given to claimant in early pregnancy.

This is the same factual predicate that the Plaintiff, Martha Drew, admitted was untrue. See Memorandum of United States in Support of Summary Judgment. It is also the same factual predicate that formed the basis of the first complaint filed in this action. The amended complaint significantly alters the facts. The amended complaint contends that rather than injecting Martha-Drew with Depo Provera during the early months of pregnancy causing birth defects in the resulting infant, that Martha Drew became pregnant while using Depo Provera as her sole birth control.

The inference from the administrative claim is that the United States was negligent in failing to assure that Martha Drew was not administered Depo Provera while pregnant. The complaint now is that the United States failed to inform Martha Drew that Depo Provera was not "100% effective in preventing live births" and failing to advise Martha Drew concerning the "risks and dangers of the use of Depo-Provera to any unborn child."[2] Thus the administrative claim alleges malpractice during pre-natal care or early months of pregnancy. The amended complaint, however, alleges totally separate acts of failing to properly inform Martha Drew of the risks involved in her choice of birth control during her pre-pregnancy period.

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[2] This is a curious allegation in that Martha Drew testified that, prior to using Depo Provera as a birth control method, she was told birth defects could result from the use of Depo Provera. Drew Deposition P. 41, Ln. 7-11; P. 46 (Ln 17-25)- P. 41(Ln. 1). Her complaint t necessarily must be that Sterling was born alive or wrongful birth. Further, in February 1996 Martha Drew again used

ARGUMENT

I. This Court lacks subject matter jurisdiction of the amended complaint. Alternatively, this Court should wanted summary, judgment as Plaintiffs have failed to file a sufficient administrative claim.

The Federal Tort Claims Act, as amended, provides, in pertinent part,:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or death caused by the negligent or wrongful or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall first have presented the claim to the appropriate

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Depo Provera as her birth control method: (1) after Sterling's birth, (2) with knowledge of Sterling's birth defects, (3) according to her, after having been informed that Depo Provera causes birth defects, and (5) aware that she became pregnant while using Depo Provera as her sole birth control method. See Martha Drew Deposition, Exhibit 18.

> Federal agency and his claim shall have been finally denied by the agency.

28 U.S.C. § 2675. Section 2676 deprives the District Court of subject matter jurisdiction over of any tort claim unless the claimant establishes that an administrative tort claim has been filed with the appropriate Federal agency. McNeil v. United States, 508 U.S. 106, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993); see also Henderson v. United States, 785 F.2d 121 (4th Cir. 1986); Kielwein v. United States, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976). Only after the claim has been denied or six months have passed may a plaintiff bring suit in federal court on the claim. 28 U.S.C. § 2675(a).

In enacting the notice requirement, Congress sought "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S.Rep.No. 1327, 89th Cong., 2d Sess. 6 (hereinafter cited as S.Rep.), reprinted in (1966) U.S.Code Cong. & Admin. News, pp. 2515, 2516. Section 2675's requirement of filing a claim before instituting suit sought to bring the claimants' allegations to the immediate attention of the relevant agency. S.Rep. at 8, reprinted in (1966) U.S:Code Cong. & Admin. News at 2518. The purpose of this notice is "to protect the (government) from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit." Id.S.Rep. at 7, U.S.Code Cong. & Admin. News at p. 2517. The "notice" provision of Section 2675 requires that the plaintiff present to the agency "a written and signed statement setting out the manner in which the injury was received" sufficient for the agency to investigate the claim. Adams v. United States, 615 F.2d 284 (5th Cir. 1980).

No courts have held sufficient a claim where, as here, the plaintiff presented to the agency one set of facts and then subsequently sued on a different set of facts. Courts have consistently barred claims that were never asserted before the agency. Mary Doe v. United States, 769 F.2d 174, 175 (4th Cir. 1985) ("Plaintiffs other theories of recovery [see Mary Doe v. United States, 618 F.Supp. 503 (D.S.C. 1984)] either were not raised administratively in satisfaction of the condition precedent to suit. . ."); John Doe v. United States of America, 618 F.Supp. 71, 75 (D.S.C. 1985) (Plaintiffs alleged medical malpractice claims were not presented in the administrative claim and thus were barred by 28 U.S.C.§ 2675.) (Hamilton, J.)(Mary Doe).

In Bush v. United States, 703 F.2d 491, 495 (9th Cir. 1983) the plaintiffs surviving spouse filed a lawsuit under the Federal Tort Claims Act for (1) negligence in performing unnecessary cancer surgery, (2) failure to obtain the decedent's informed consent and (3) negligent post-operative care. With regard to the informed consent cause of action as to whether it was addressed administratively, the court ruled as follows:

> Neither the claim nor the attached medical evaluation contained any challenge to the consent form signed by Mr. Bush prior to the surgery. There was no allegation that the doctors failed to disclose the risks involved in the medical procedures. Thus, the VA was not properly apprized of its potential liability on

> this sound, and had not opportunity to investigate the claim. Because the appellant failed to comply with the statutory, requirement of § 2675 mandating presentation of the claim to the agency, we agree with the district court that it lacked jurisdiction over this specification of liability. (emphasis added.)

Bush, 703 F.2d at 495; see also Sullivan v. United States, 777 F.Supp. 695, 701 (N.D.Ind. 1991) (following Bush, barring widow's claim of negligent infliction of emotional distress); Murrey v. United States, 73 F.3d 1448, 1453 (7th Cir. 1996); Deloria v. United States, 927 F.2d 1009, 1012 (7th Cir. 1991); contra Frantz v. U.S.A., 29 F.3d 222 (5th Cir. 1994).

Even Frantz,[3] in rejecting the Bush notion that informed consent was not subsumed in the medical malpractice claim on the same medical procedure the court noted "the purpose of §2675 will be served as long as a claim brings to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." Unlike Bush and Franz, in the case at bar, the "informed consent" claim is not related to the same factual allegations set out in the administrative claim.

---

[3] Franz relied on a Texas statute which brought medical malpractice claims and claims for failing to obtain informed consent into one.

The facts presented in the administrative claim were that Martha Drew received Depo Provera injections during the early months of pregnancy. Instead of making claims regarding "informed consent" related to the act of injecting her with Depo Provera after she became pregnant, Plaintiffs now claim Martha Drew was not informed regarding the effectiveness of Depo Provera in preventing "live births" and the possibility of birth defects if the product failed as a contraceptive.[4]

Where, as here, the administrative claim does not fairly place the agency on notice that certain facts require investigation, allegations in a subsequent FTCA action which relate to those facts must be stricken. Emch v. United States, 630 F.2d 523, 526-528 (7th Cir. 1980) (the claims that defendant was negligent at the operational level were not expressed in the administrative claim that was filed, and the Court did not have jurisdiction to consider it in a FTCA lawsuit); Bembenista v. United States, 866 F.2d 493,498-499 (D.C. Cir. 1989), aff'd in relevant part, 676 F.Supp. 18, 22 (D.D.C. 1988) (the administrative claim solely alleged the sexual molestation concluded that this was not the type of fair notice that Congress envisioned when it fashioned the presentment requirement); Adames Mendez v. United States, 652 F.Supp. 356, 358 (D.P.R. 1987) ("the relevant criteria for a correct administrative claim was whether the agency was fully aware of who were the individuals actually pursuing a claim and the nature of the total claim"); Hagmeyer v. United States Treasury, 647 F.Supp. 1300, 1304 (D.D.C. 1986) (it is quite apparent to the Court that plaintiffs previously filed administrative claims do not mirror the claims encompassed in Count I of his complaint); Hogan v. United States, C/A No.: 3:92-1663-17, 3:92-1664-19 (claims of (1) inadequate hospital space and facilities and (2) inadequate nursing staff not administratively raised were barred as not included in claim that "death was proximately caused by . . . discharging Mr. Hogan and leaving him fled in a wheel chair unattended.) (Exhibit 2); Caldwell v. United States, C/A No.: 3:87-650-0, 3:87-651-0) (claim for consortium not raised administratively and barred where only wife signed form) (Exhibit 3); Rainwater v. United States, C/A No.: 2:87-2032-1 (administrative claim for negligently installed and serviced smoke dector alarms did not include claim for negligently and improperly failing to install additional smoke detector alarms) (Exhibit 4); Uhal v. United States, C.A. 2:87-0034-8 (D.S.C. Jan. 20, 1989) (Plaintiffs claim alleged that her surgical operation was negligently performed; additional allegations in the complaint of failure to obtain informed consent dismissed as not presented in the administrative claim)(Exhibit 5). Even courts requiting "minimal notice" require that the claim "inform[] the relevant agency of the circumstances of the accident so that it may investigate the claim and respond either by settlement or by defense." Adams v. United States, 615 F.2d 284, 289 (5th Cir. 1980).

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[4] As with the factual allegations in the first complaint, Martha Drew admits that she was informed that Depo Provera could cause birth defects. Drew Deposition P. 41, Ln. 7-11; P. 46 (Ln 17-25)- P. 41 (Ln. 1).

Simply put, the Drews submitted an administrative claim on one set of facts which occurred at different time periods. They now seek to file suit of a wholly different set of facts. Section 2675 allows jurisdiction on the claim filed only. The facts alleged in the amended complaint have never been presented to the agency via administrative claim. The amended complaint must, therefore, be dismissed.

Respectfully submitted,

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November 12, 1998.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

[Filed October 30, 1998]

Civil Action No. 3:98-1817-19

Sterling Drew, a minor under the age thirteen years, by his Guardian ad Litem Martha Drew and Martha and Jebediah Drew,
Plaintiff,

v.

United States of America,
Defendant.

AMENDED MOTION TO DISMISS INFORMED CONSENT CLAIM OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

The United States of America, by and through its attorney, J. René Josey, hereby moves the Court to dismiss the amended complaint for lack of subject matter jurisdiction or in the alternative grant the United States summary judgment. Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 56.

The defendant respectfully moves this Court for an Order dismissing Plaintiffs' amended complaint or alternatively granting the United States summary judgment.

Respectfully submitted,
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UNITED STATES ATTORNEY

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed October 30, 1998]

Civil Action No. 3:98-1817-19

Sterling Drew, a minor under the age of)
thirteen years, by his Guardian ad Litem)
Martha Drew and Martha and Jebediah)
Drew Personally)
Plaintiff,)
)
v.)
)
The United States of America,)
Defendant.)
)

AMENDED COMPLAINT
(FEDERAL TORT CLAIMS ACT)

The Plaintiffs for a Complaint against the Defendant above named would respectfully show unto this Honorable Court as follows:

FOR A FIRST CAUSE OF ACTION

1. That the Plaintiff, Martha Drew, is a citizen and resident of the County of Sumter, State of South Carolina, and is the mother, natural guardian, as well as the duly appointed Guardian Ad Litem, of the minor Plaintiff, Sterling Drew.

2. That the Plaintiff, Jebediah Drew, is likewise a citizen and resident of the County of Sumter, State of South Carolina, and is the natural father of the minor, Sterling Drew, and is the co-natural and legal guardian of Sterling Drew, together with the Plaintiff, Martha Drew.

3. That the minor Plaintiff, Sterling Drew, is a citizen and resident of the County of Sumter, State of South Carolina, and brings this action through his duly appointed Guardian Ad Litem, Martha Drew.

4. That the Defendant, the United States of America, was at all times pertinent hereto, acting through its agents and servants, in the course and scope of their agency and employment, and through its duly constituted agency, the Department of the Air Force, from Shaw Air Force Base, South Carolina.

5. That the Court has subject-matter jurisdiction over the claims and causes of actions set forth herein, pursuant to the provisions of the Federal Tort Claims Act, and specifically, 28 U.S.C. SECTION 1346 (b), and SECTIONS 2671-2680.

6. That at all times pertinent hereto, the Plaintiff, Jebediah Drew was, and still is as of the date of this amended Complaint, an active member of the United States Air Force, and the Plaintiff, Martha Drew, as his dependent, received medical treatment from the hospital located at Shaw Air Force Base, South Carolina.

7. That as part of this treatment, Martha Drew received birth control counselling, and birth control medication, in the form of intra-muscular injections of Depo-Provera.

8. That prior to administering these Depo-Provera injections to the Plaintiff, Martha Drew, the Defendant, acting through its agents and servants and its duly constituted agency, the Department of the Air Force at Shaw Air Force Base, South Carolina, told the Plaintiff, Martha Drew, that Depo-Provera was 100% effective in preventing live births.

9. That this information concerning the effectiveness of Depo-Provera was false in that while she was using Depo-Provera as her sole birth control devise, the Plaintiff Martha Drew became pregnant with the Plaintiff Sterling Drew.

10. That the Defendant was negligent, reckless, willful, and wanton in the administration of Depo-Provera to the Plaintiff, Martha Drew in the following particulars:

A. In failing to appropriately supervise its personnel;

B. In giving the Plaintiff false and misleading information concerning the effectiveness of Depo-Provera in preventing live births

C. In failing to provide appropriate counselling and/or information concerning the risks and dangers of the use of Depo-Provera to any unborn child;

D. In failing to disclose to the Plaintiff Martha Drew all information concerning all of the risks associated with the use of Depo-Provera as a birth control devise that a reasonable medical practitioner providing birth control counseling and services would have made under the same or similar circumstances.

E. In failing to use the degree of care and caution that a reasonable and prudent provider of obstetrical and gynecological health care should have used under the circumstances then and there prevailing.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, herein, all of said acts and delicts being in violation of applicable legal principles.

11. That as a direct and proximate result of the above set forth delicts, the Plaintiff, Sterling Drew, suffered grievous and permanent physical injury, including but not limited to, an imperforate anus, a ventricular septal defect in his heart, as well as genetic, developmental, glandular, and mental disorders.

12. That as a further direct and proximate result of the above set forth delicts, the Plaintiff, Sterling Drew, suffered, continues to suffer, and will suffer the following additional injuries and damages:

A. Pretrial medical expenses;

B. Post-trial future medical expenses;

C. Loss of earning capacity;

D. Pretrial physical pain and suffering, mental pain and suffering, mental anguish and shock;

E. Post-trial physical pain and suffering, mental pain and suffering, mental anguish and shock;

F. Disabled condition and loss of enjoyment of life.

13. That the Plaintiffs have exhausted their administrative remedies under the Federal Tort Claims Act in that they timely filed an administrative claim with the Department of the Air Force and said claim was denied in a letter from the Department of the Air Force mailed to Plaintiffs' Counsel on December 23, 1997.

14. That the Plaintiff, Sterling Drew, is therefore informed and believes that he is entitled to a judgement against the Defendant in accordance with the provisions of the Federal Tort Claims Act.

FOR A SECOND CAUSE OF ACTION

15. That the preceding allegations of this Complaint are incorporated by reference as fully as set forth verbatim herein.

16. That as a direct and proximate result of the delicts of the Defendant, as alleged more fully in Paragraph 10, Subparagraphs A through E, hereinabove, the minor child of the Plaintiffs, Martha and Jebediah Drew, Sterling Drew, suffered grievous and permanent harm and injury as alleged more fully in Paragraphs 10 and 11, hereinabove, all of which has and will in the future and permanently cause the Plaintiffs, Martha Drew, and Jebediah Drew, to be jointly and severally obligated and compelled to expend large and considerable sums of money for physician services, drugs, X-rays, hospital expenses, genetic counselling, therapy, and further costs and expenses to be paid to health care professionals for tests to determine additional problems with the minor Plaintiff, Sterling Drew.

17. That the Plaintiffs, Martha Drew and Jebediah Drew, are therefore informed and believe that they are entitled to a judgement against the Defendant in accordance with the Federal Tort Claims Act.

WHEREFORE, the Plaintiffs pray as follows:

1. On the First Cause of Action, for a judgment against the Defendant and in favor of the Plaintiff, Sterling Drew, in an appropriate amount of actual and damages to be determined by the Court in accordance with the Federal Tort Claims Act.

2. On the Second Cause of Action, for a judgement in favor of the Plaintiffs, Martha and Jebediah Drew, and against the Defendant, in an appropriate amount to be determined by the Court in accordance with the Federal Tort Claims Act.

3. That each Plaintiff be awarded his/her costs in this action.

4. That each Plaintiff be awarded such other and further relief as the Court may deem just and proper.

WEINBERG AND BROWN

BY: /s/ ________________________
M. M. WEINBERG, III.
Federal ID No.: 4570
109 North Main Street
Post Office Box 1289
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(803) 775-1274
ATTORNEYS FOR PLAINTIFFS

Sumter, South Carolina
October 26, 1998

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

[Filed October 15, 1998]

Civil Action No. 3:98-1817-19

STERLING DREW, a minor under the)
age of thirteen years, by guardian ad litem)
Martha Drew; **MARTHA DREW**; and)
JEBEDIAH DREW,)
Plaintiff,)
)
v.)
)
THE UNITED STATES OF AMERICA,)
Defendant.)
)

ORDER

Plaintiffs filed an administrative claim and, subsequently, this medical malpractice lawsuit based on their specific contention that an agent or employee of the United States administered a Depo Provera (birth control) injection to Martha Drew ("Martha") while she was pregnant with Sterling Drew ("Sterling"), and this injection caused Sterling to be born with birth defects. The United States has moved for summary judgment based on Martha's deposition testimony, in which she stated that she did not receive a Depo Provera injection from any United States employee or agent while she was pregnant with Sterling.[1] The United States argues that Martha's testimony is directly contrary to the allegation upon which plaintiffs' case is premised and, consequently, their claim necessarily must fail as a matter of law.

After the United States moved for summary judgment, plaintiffs filed a motion to amend the complaint. Essentially, plaintiffs seek to conform their allegations to Martha's testimony.[2] The United States has responded to the motion to amend by stating that while it has no objection to allowing plaintiffs to amend, it intends to contest whether the Court has subject-matter jurisdiction over the amended complaint.[3]

---

[1] In their complaint and answers to Local Rule interrogatories, plaintiffs specifically assert that United States personnel administered Depo Provera injections to Martha *while she was pregnant*. In her contrary deposition testimony, however, Martha admits that this allegation is inaccurate, and she states that her claim is actually based on the fact that she became pregnant *after* receiving a Depo Provera injection.

[2] It is unclear why plaintiffs' original allegations differ significantly from her testimony.

[3] The United States anticipated that plaintiffs would seek to amend, arguing in its summary judgment memo that an amendment would raise a jurisdictional problem. Plaintiffs addressed this issue in their memorandum in support of the motion to amend.

The Court will grant the motion to amend.[4] Plaintiffs shall file and serve the amended complaint by no later than October 26, 1998. Upon the filing of the amended complaint, the Clerk of Court shall (without further Order) moot the motion for summary judgment. If plaintiffs fail to file and serve the amended complaint by October 26, the Court will consider the summary judgment motion.[5]

IT IS SO ORDERED on this the 15th day of October, 1998, at Columbia, South Carolina.

/s/____________________
DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

---

[4] Although the Court is permitting this amendment, it expresses no opinion on the jurisdictional issue identified by the United States.

[5] After the Court had reviewed and considered the motion for summary judgment, the parties consented to proceed before a United States Magistrate Judge. The Court finds that until the jurisdictional or summary judgments are resolved, it would be a waste of judicial resources to refer this file, with which the Court is now familiar, to another judicial officer.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

[Filed June 22, 1998]

Civil Action No. 3:98-1817-19

Sterling Drew, a minor under the age of thirteen years, by his Guardian ad Litem Martha Drew and Martha and Jebediah Drew Personally
Plaintiff,

v.

The United States of America,
Defendant.

The Plaintiffs for a Complaint against the Defendant above named would respectfully show unto this Honorable Court as follows:

FOR A FIRST CAUSE OF ACTION

1. That the Plaintiff, Martha Drew, is a citizen and resident of the County of Sumter, State of South Carolina, and is the mother, natural guardian, as well as the duly

appointed Guardian Ad Litem, of the minor Plaintiff, Sterling Drew.

2. That the Plaintiff, Jebediah Drew, is likewise a citizen and resident of the County of Sumter, State of South Carolina, and is the natural father of the minor, Sterling Drew, and is the co-natural and legal guardian of Sterling Drew, together with the Plaintiff, Martha Drew.

3. That the minor Plaintiff, Sterling Drew, is a citizen and resident of the County of Sumter, State of South Carolina, and brings this action through his duly appointed Guardian Ad Litem, Martha Drew.

4. That the Defendant, the United States of America, was at all times pertinent hereto, acting through its agents and servants, in the course and scope of their agency and employment, and through its duly constituted agency, the Department of the Air Force, from Shaw Air Force Base, South Carolina.

5. That the Court has subject-matter jurisdiction over the claims and causes of actions set forth herein, pursuant to the provisions of the Federal Tort Claims Act, and specifically, 28 U.S.C. SECTION 1346 (b), and SECTIONS 2671-2680.

6. That at all times pertinent hereto, the Plaintiff, Jebediah Drew, was and still is an active member of the United States Air Force, and the Plaintiff, Martha Drew, as his dependent, receive medical treatment from the hospital located at Shaw Air Force Base, South Carolina.

7. That as part of this treatment, Martha Drew received birth control counselling, and birth control medication, in the form of intravenous injections of Depo-Provera.

8. That these Depo-Provera injections were administered to the Plaintiff, Martha Drew, by the Defendant, acting through its agents and servants and its duly constituted agency, the Department of the Air Force at Shaw Air Force Base, South Carolina, when the Plaintiff, Martha Drew, was in fact pregnant with the minor Plaintiff, Sterling Drew.

9. That the Defendant was negligent, reckless, willful, and wanton in the administration of Depo-Provera to the Plaintiff, Martha Drew in the following particulars:

A. In failing to appropriately supervise its personnel;

B. In failing to adopt appropriate policies and procedures to ensure that Depo-Provera would not be given to women who were in fact pregnant;

C. In giving her Depo-Provera as a birth control device without first administering a pregnancy test;

D. In failing to follow the appropriate standard of care for the administration of Depo-Provera, in that she was given Depo-Provera after the first five (5) days of her menstrual cycle;

E. In failing to receive appropriate counselling and/or information concerning the risks and dangers of the use of Depo-Provera to any unborn child;

F. In failing to use the degree of care and caution that a reasonable and prudent provider of obstetrical and gynecological health care should have used under the circumstances then and there prevailing.

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiffs, herein, all of said acts and delicts being in violation of applicable legal principles.

10. That as a direct and proximate result of the above set forth delicts, the Plaintiff, Sterling Drew, suffered grievous and permanent physical injury, including but not limited to, an imperforate anus, a ventricular septal defect in his heart, as well as genetic, developmental, glandular, and mental disorders.

11. That as a further direct and proximate result of the above set forth delicts, the Plaintiff, Sterling Drew, suffered, continues to suffer, and will suffer the following additional injuries and damages:

A. Pretrial medical expenses;

B. Post-trial future medical expenses;

C. Loss of earning capacity;

D. Pretrial physical pain and suffering, mental pain and suffering, mental anguish and shock;

E. Post-trial physical pain and suffering, mental pain and suffering, mental anguish and shock;

F. Disabled condition and loss of enjoyment of life.

12. That the Plaintiffs have exhausted their administrative remedies under the Federal Tort Claims Act in that they timely filed an administrative claim with the Department of the Air Force and said claim was denied in a letter from the Department of the Air Force mailed to Plaintiffs' Counsel on December 23, 1997.

13. That the Plaintiff, Sterling Drew, is therefore informed and believes that he is entitled to a judgement against the Defendant in accordance with the provisions of the Federal Tort Claims Act.

FOR A SECOND CAUSE OF ACTION

14. That the preceding allegations of this Complaint are incorporated by reference as fully as set forth verbatim herein.

15. That as a direct and proximate result of the delicts of the Defendant, as alleged more fully in Paragraph 9, Subparagraphs A through F, hereinabove, the minor child of the Plaintiffs, Martha and Jebediah Drew, Sterling Drew, suffered grievous and permanent harm and injury as alleged more fully in Paragraphs 10 and 11, hereinabove, all of which

has and will in the future and permanently cause the Plaintiffs, Martha Drew, and Jebediah Drew, to be jointly and severally obligated and compelled to expend large and considerable sums of money for physician services, drugs, X-rays, hospital expenses, genetic counselling, therapy, and further costs and expenses to be paid to health care professionals for tests to determine additional problems with the minor Plaintiff, Sterling Drew.

16. That the Plaintiffs, Martha Drew and Jebediah Drew, are therefore informed and believe that they are entitled to a judgement against the Defendant in accordance with the Federal Tort Claims Act.

WHEREFORE, the Plaintiffs pray as follows:

1. On the First Cause of Action, for a judgment against the Defendant and in favor of the Plaintiff, Sterling Drew, in an appropriate amount of actual and damages to be determined by the Court in accordance with the Federal Tort Claims Act

2. On the Second Cause of Action, for a judgement in favor of the Plaintiffs, Martha and Jebediah Drew, and against the Defendant, in an appropriate amount to be determined by the Court in accordance with the Federal Tort Claims Act.

3. That each Plaintiff be awarded his/her costs in this action.

4. That each Plaintiff be awarded such other and further relief as the Court may deem just and proper.

WEINBERG AND BROWN

BY: /s/_______________________
M. M. WEINBERG, III
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ATTORNEYS FOR PLAINTIFFS

Sumter, South Carolina
June 22, 1998

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[September 4, 1998]

Civil Action No. 3:98-1817-19

STERLING DREW, a minor under the age of thirteen years, by GUARDIAN AD LITEM, MARTHA DREW, and MARTHA DREW and JEBEDIAH DREW personnally
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

DEPOSITION OF: MARTHA DREW

DATE: September 4, 1998

TIME: 10:25 a.m.

Deposition of Martha Drew - 9/4/98

LOCATION:	Law Offices of Weinberg & Brown 109 North Main Street Sumter, SC
TAKEN BY:	Counsel for the Defendant
REPORTED BY:	Janet L. LeVeque, Court Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Charleston, SC
(843) 722-8414

Columbia, SC
(803) 731-5224

Greenville, SC
(864) 234-7030

Charlotte, NC
(704) 573-3919

(DEF. EXH. 1 through 20, Documents described at Index, were premarked marked for identification.)

(PLF. EXH. 1, Medication Profile (3 pages), was marked for identification.)

MR. WEINBERG: Let me put the stipulations on the record. This is a pre-answer deposition that's being taken by stipulation of the parties. The parties further stipulate that this deposition will not be concluded, but rather adjourned for possible reconvening later in the lawsuit. Other than that, the standard stipulations apply under the Federal Rules of Civil Procedure in a standard discovery deposition.

Is that your understanding?

MS. TRAPP: That's my understanding.

EXAMINATION

BY MS. TRAPP:

Q. My name is Fran Trapp. I'm an assistant United States attorney, and we're here to take your deposition today. Hopefully, this won't take a real long time. If I ask any questions that you don't understand, let me know, just ask me. You must answer yes or no. The stenographer cannot take down a snaking of the head yes or no.

A. Okay.

Q. If you don't understand something, again, I'll be happy to explain my question. We're going to start out with just a few basic personal questions. In terms of your full name, would you please give me your full name?

A. Martha Jane Drew.

Q. And your address?

A. 5351-A North Mulberry, Shaw Air Force Base.

Q. Telephone number?

A. Area code (803) 499-5961.

Q. What's your date of birth?

A. 1/15/74.

Q. And your social security number?

A. It's 409-41-8180.

Q. Do you know your driver's license number?

A. Not offhand, I don't.

Q. Do you have it with you?

A. I don't believe I do. No, I sure don't.

Q. Could you give me your educational background, please, ma'am?

A. Okay. I finished high school, and then I went to two years of college up in Anchorage, Alaska.

Q. What year did you finish high school?

A. 1991.

Q. What did you major in? What did you study your two years of college?

A. Opticianry.

Q. Are you employed?

A. Uh-huh.

Q. Where are you employed?

A. I'm an optician at Sears Optical.

Q. How long have you been employed there?

A. For about a year.

Q. Were you employed prior to that?

A. Not there. I was employed but not at that time.

Q. Where were you employed prior to that?

A. I worked at Sambino's for a little while.

Q. Is that a restaurant?

A. Uh-huh. It's here in Sumter.

Q. And how long did you work at Sambino's?

A. For about six months.

Q. And were you employed in Sumter prior to --

A. I've had temporary jobs. I worked with Norman Williams through a temporary agency.

Q. What's Norman Williams?

A. They are like a temp. They find you different jobs around Sumter.

MR. WEINBERG: It's like a local version of Kelly Services.

BY MS. TRAPP:

Q. Are you married?

A. Uh-huh.

Q. Is this your first marriage?

A. Yes.

Q. The date of your marriage?

A. It was June 12th, 1992.

Q. And how many children do you have?

A. Three.

Q. Girls? Boys?

A. I have two boys and a girl.

Q. Right now we're going to go into your reproductive history, history of the birth of your children. Other than Sterling, how many pregnancies have you had?

A. I've had five.

Q. And how old were you when you first became pregnant?

A. I was 18.

Q. Were you married?

A. Yes.

Q. Did your first pregnancy result in a live birth?

A. Yes.

Q. And was that a girl or boy?

A. It was a boy.

Q. And what is that child's name?

A. Avery.

Q. Where was that child born?

A. Shaw Air Force Base.

Q. And that was your first pregnancy?

A. Right.

Q. Tell me about your second pregnancy. What age were you then?

A. Well, I got pregnant when I was 19. I had her when I was 20.

Q. Back to your first pregnancy, were you using any birth control method when you became pregnant?

A. No.

Q. Was it a planned pregnancy?

A. Yes, it was.

Q. You stated that was a boy?

A. Yes.

Q. What's that child's name?

A. Avery.

Q. Now, your second pregnancy, you were 19, the child was born when you were 20?

A. Yes.

Q. Were you using any birth control methods when you became pregnant the second time?

A. Yes, I was.

Q. What were you using?

A. I was using Ortho-Novum.

Q. Were you compliant with your Ortho-Novum? Were you taking your pills regularly --

A. Yes.

Q. -- every day like you were supposed to?

A. Yes.

Q. Did that pregnancy result in a live birth?

A. Yes, it did.

Q. What is that child's name?

A. Summer.

Q. What year was Summer born?

A. 1994.

Q. Summer was born June 11, 1994?

A. Yes.

Q. Just to make sure that you understand my questions, when I asked you about your first pregnancy, and you told me Avery, then your second pregnancy was Summer. You told me that you had five pregnancies. Do you have five children?

A. No, I don't.

Q. You have three children; is that correct?

A. Yes, I do.

Q. Tell me about the two pregnancies which did not result in a live birth?

A. I've had two miscarriages between my second and third child.

Q. So we are talking about the same thing. Okay.

Now Summer was born June 11th, 1994?

A. Yes.

Q. And your third child is?

A. He was born in December of '95.

Q. December of 1995. And his name is?

A. Sterling.

Q. Sterling. So is it your testimony that between June 11th, 1994 and December of 1995 that you had two miscarriages?

A. Yes.

Q. Who provided your medical care for those miscarriages?

A. I was seen out at Shaw Air Fore Base. I've seen several people out there.

Q. At the time you had your miscarriages, you were at Shaw?

A. Uh-huh. Yes.

Q. Let's start with your Shaw records from June 11th, 1994.

A. Okay.

Q. June 11th, 1994 was the birth of your second child Summer; is that correct?

A. Yes.

Q. Where was Summer born?

A. Tuomey.

Q. Please look at Defendant's Exhibit Number 1. There may have been some medical records in the record between June 11th, 1994 and July 27th, 1994. But I believe that this July 27th, 1994 is the first time you came in seeking birth control after the birth of Summer.

A. Yes, it was.

Q. Is that correct?

A. Yes.

Q. Now, this July 27th 1994 form, Exhibit 1, did you fill out that form? Is that your writing?

A. Yes, it is.

Q. Do you see the date on this form where it says date? Did you write in the date there of July 27, 1994?

A. Up here at the top?

Q. That's the stamped date on the left-hand side to the right of that.

A. Yes.

Q. Is your handwriting -

A. Yes, it is.

Q. -- July 27th, 1994. So that was the date that you filled out this form?

A. Yes.

Q. Now, almost on the bottom of the form, the last line, it's tubal ligation, vasectomy. It talks in here, do you wish to use any of the following means of contraception, and you wrote down there Depo shot. Did you write that?

A. Yes, I did.

Q. Did you mean by that a Depo-Provera shot?

A. Yes, I did.

Q. Were you indicating that was your preferred method of birth control?

A. Yes.

Q. Had you taken Depo-Provera prior to July 27, 1994?

A. No, I did not.

Q. Please look at Defendant's Exhibit Number 2. Defendant's Exhibit Number 2 indicates that on July 28, 1994 Major Schalck ordered for you Depo-Provera shots to be repeated every 12 weeks --

A. Yes.

Q. -- for three periods. At that time were you advised that you had to return every 12 weeks for your second and third shot?

A. Yes, I was.

Q. What were you told would happen if you did not return in 12 weeks?

A. I was not told anything. I was just told to return in 12 weeks.

Q. Okay. Did they tell you that if you returned in 14 weeks what might happen?

A. No, ma'am.

Q. They didn't tell you anything, just to return in 12 weeks?

A. Yes.

Q. Now, back to Exhibit Number 1, look at the one, two, three, four, five, six, seventh printed line from the bottom of the printed line: Have you resumed intercourse since delivery? What did you indicate there?

A. I said no.

Q. That you had not. Okay?

A. Yes.

Q. And therefore you could you possibly have been pregnant on July 27, 1994?

A. No, ma'am.

Q. Okay. Now, the next day, on July 28, 1994, did you receive an injection of Depo-Provera?

A. Yes.

Q. Where did you receive the injection, what part of your body?

A. In my hip, I believe.

Q. Do you know the difference between an intravenous and an intramuscular injection?

A. An intramuscular injection is in the muscle.

Q. And intravenous is?

A. I'll not sure what that means.

Q. Do you know how Depo-Provera is administered?

A. I do know how it was administered to me.

Q. How was it administered to you?

A. In my hip.

Q. So do you know whether that would be in the muscle or in the vein?

A. I believe that would be in the muscle.

Q. Please look at Exhibit Number 3, Defendant's Exhibit Number 3. Again, this is page 254 from your medical record, and look down there where it notes 24, October 1994.

A. Yes.

Q. According to this record, you were administered a Depo-Provera shot on 24, October 1994 by Irma Carpenter. Do you believe that record to be correct?

A. Yes.

Q. So is it your testimony that you were administered this shot on October 24, 1994?

A. Yes, I was.

Q. Okay. And that's, roughly, within 12 weeks of the first shot you received in July 28, 1994; is that correct?

A. Uh-huh. Yes.

Q. Did you go to the clinic at Shaw Air Force Base, other than for the family advocacy program, but for medical care between July 28, 1994 and October 24th, 1994?

A. I don't believe I did.

Q. I have no records that you did. I just wanted to make sure my records were complete.

A. Not that I recall, I did not.

Q. So you have no information that between the 28th of July 1994 and October 24th, 1994 that you went to the clinic. Were you pregnant during that time?

A. No, I wasn't.

Q. The next notation that your medical records show of your going to the clinic at Shaw Air Force Base is Defendant's Exhibit Number 4. This record shows that you presented at the ER on December 20th, 1994. Do you remember that evening? According to the records you presented with an earache on December 20, 1994, to the emergency room at Shaw Air Force Base.

A. I'm trying to remember that.

Q. Okay. Do you have any reason to believe that this record is –

A. No I don't.

Q. -- false?

You also reported a stomach ache on that evening, and that you had -- I think that you may have reported some breakthrough bleeding also.

A. I do remember that now.

Q. You do remember?

A. Uh-huh. It was the initial, because I was bleeding. That's the reason why I went in.

Q. I do not show any other visits to the Shaw clinic between the 24th of October 1994 and this December 20th ER visit. Do you have to any records of any other visits to the Shaw clinic during that period of time?

A. No, I don't.

Q. Please look at Defendant's Exhibit Number 5. According to Defendant's Exhibit Number 5, you reported to the OBGYN clinic at Shaw on the 29th of December 1994, reporting breakthrough bleeding with cramping. Do you remember that?

A. Yes, I do.

Q. So to the best of your knowledge, this record is correct?

A. Yes, it is.

Q. Defendant's Exhibit 5, you were given five days' birth control pills in order to regulate the bleeding. Do you remember that?

A. Yes, I do.

Q. Did you take the five days' of birth control pills?

A. Yes.

Q. Did it regulate the bleeding?

A. No, it did not.

Q. Now, the next record on your Shaw medical records is Defendant's Exhibit Number 6, which shows that you reported to the ER with an earache on February the 16th, 1995. Do you remember that visit to the emergency room?

A. Yes, I do.

Q. Okay. Is this record, page 265, from your medical record, is that correct?

A. To my knowledge, it is.

Q. So to your knowledge it's correct, okay.

Did you visit the Shaw clinic any time between December 29th, 1994 and February the 16th, 1995?

A. I can't recall if I did or not.

Q. Do you have any documents to show that you visited the Shaw clinic between December 29, 1994 and February the 16th, 1995?

A. No, I don't.

Q. Did you receive a Depo-Provera shot between December 29th, 1994 and February 1st, 1995?

A. Between those dates.

Q. I'm sorry. February 16th, 1995.

A. Between December --

Q. 29th.

A. 29th.

Q. 1994.

A. Uh-huh.

Q. And December -- I'm sorry, and February the 16th, 1995?

A. I recall that I was given the Depo-Provera shot the 1st of September. Excuse me. February, February of 1995.

Q. You were given a Depo-Provera shot on February 1st, 1995?

A. Around that date, yes.

Q. Around that date. Where were you given that shot? Who gave that to you?

A. I believe the same nurse.

Q. It's your testimony that you received a Depo-Provera shot from Shaw Air Force Base clinic --

A. Yes.

Q. -- around February the 1st, 1995?

A. Yes, it is.

Q. And that record is not -- I'm telling you that record is not in your medical records.

A. That's what I recall, is around that date.

Q. Okay. Now, on February 17th, 1995, you reported to the OBGYN clinic --

MR. WEINBERG: What exhibit are you referring to?

MS. TRAPP: I'm sorry. Exhibit Number 7.

Q. -- complaining of stomach pain and requesting a pregnancy test; is that correct?

A. Yes, I do.

Q. At that time you reported that you had taken your Depo-Provera shot some ten weeks prior to that?

A. Two weeks.

Q. Is that two weeks?

A. Two. It was two weeks.

Q. Which would have been around February the 1st.

Are there any other visits to the Shaw medical facility between October the 24th, 1994 and February the 17th, 1995, besides your February 1st that you've testified to that I did not have in these in these records, that I have not shown you?

A. Uh- huh.

Q. There are?

A. No, no. There aren't.

Q. So there's only the February 1st Depo-Provera shot that you received from the Shaw clinic that I don't have a record of; is that correct?

A. Yes.

Q. That I haven't shown you here today?

A. Yes.

Q. Between that period of time, okay.

Now, on February 17th, 1995, you reported that --

MR. WEINBERG: Are you still on Exhibit 7?

MS. TRAPP: Yes.

Q. -- your home pregnancy test was positive. Do you remember that?

A. Yes, I do.

Q. Were you given a pregnancy test by Shaw Air Force Base?

A. Yes.

Q. What were the results of that test?

A. They were negative.

Q. So you were in fact not pregnant at that time?

A. Yes.

Q. Let's look at Defendant's Exhibit Number 8. This is a medical record dated 27, April 1995. Now, did you return to the medical clinic at Shaw Air Force Base between February the 17th, 1995 and April the 27th, 1995?

A. No, I did not.

Q. So this is your next visit to the Shaw Air Force Base clinic after February the 17th negative pregnancy test; is that correct?

A. Yes.

Q. Now, Exhibit Number 8, look at Exhibit Number 8. Did you fill out that? Is that your handwriting?

A. Yes, it is.

Q. Let's start at the top of this exhibit. It says, name of medication requested. You request Ortho-Novum. Do you know what that is?

A. That's the little -- that is the birth control pills.

Q. Birth control pills, okay. Then the next says, reason for request, ran out. And then if we go on down a little bit further it asks you, date you took your last pill. It says April the 26th. Would that have been the day before, April 27th, 1995?

A. Yes.

Q. So was it your intent to indicate to the medical personnel there that you were on birth control pills, had taken your last pill on the 26th and had just run out?

A. Yes.

Q. Was that true? When did you start taking the birth control pills?

A. When they were given to me.

Q. When were they given to you?

A. I'm trying to recall. I believe back when I went into the -- I believe it was back in October, I believe.

Q. October? Now, October 24th, you came in for a Depo-Provera shot.

A. When I had gone in, because I was bleeding.

Q. That was December, December 29th?

A. Okay. Well, it's hard for me to remember what exactly happened.

Q. December 29th, 1994, you went in and were prescribed a five-day course. Were you given a whole month's worth then? I guess they come packaged in a month; is that correct?

A. Yes, they do.

Q. Were you given a month's package at that time?

A. I believe I was.

Q. So sometime prior to April 26th you just started taking what was left of that package?

A. Right.

Q. Now, on April 27th you reported your last monthly period as April the 13th?

A. Yes, I did.

Q. Do you think that was correct?

A. Yes.

Q. Okay. How exact do you think you would have known on April 27th what your last monthly period was the date?

A. It was pretty correct.

Q. Pretty correct?

A. Yes. I kept a calendar of --

Q. You kept a calendar? Do you still have the calendar?

A. No.

Q. Here you list the total number of pregnancies as three.

A. I believe it was my understanding. I don't know exactly why I put three. I don't know. I don't recall it.

Q. At this point, as of the 27th of April, 1995, you have two live children; is that correct?

A. Yes.

Q. Summer, and what's the first child?

A. Sterling.

Q. No. Is Sterling born yet?

A. No. Avery. Excuse me.

Q. So you have Avery and Summer?

A. Uh-huh.

Q. And you testified that you had two miscarriages between Summer and Sterling; is that correct?

A. Yes, I did.

Q. When did those miscarriages occur?

A. To my knowledge, I believe they occurred between --it's hard for me to remember.

Q. Your medical records contain nothing about those miscarriages between June 11th, 1994 and April 27th, 1995. Can you help me out here?

A. I believe that when I said that I had miscarriages was because I had taken pregnancy tests that were positive, when in fact I did not have a period. And then I started bleeding, and I believed that I did have a miscarriage at that time. Now, I'm trying to remember exactly what the dates are.

Q. So when you came in on February 17th, 1995, according to Defendant's Exhibit Number 7, for example, reported that you had stomach pain and that your pregnancy test, home pregnancy test was positive, but the Shaw pregnancy test was negative. So it was your belief that between the time your home pregnancy test was positive and you got the Shaw pregnancy test that you in fact miscarried?

A. Yes. That was my belief.

Q. Were you told by a medical doctor that you had in fact miscarried?

A. Not at that time, I wasn't.

Q. Were you ever told by a medical doctor or nurse practitioner that you miscarried --

A. No, I wasn't.

Q. -- at that time? Okay. Let's look at Exhibit Number 9. Here we have at the bottom of this exhibit, written in by Major Schalck, she, in fact, changed your birth control method to Ortho-Novum -- that's what ON means there, I believe -- on the 27th of -- this is a continuation of that same sheet, the 27th of April 1995.

Do you remember that? Do you remember getting --

A. Yes, I do.

Q. Now, the next report –

MR. WEINBERG: The date on that record?

MS. TRAPP: It is a continuation. If you'll see, the sheets are numbered 269 and 270. It's the same sheet from Exhibit 8 and 9.

MR. WEINBERG: Okay.

BY MS. TRAPP:

Q. The next reported visit to the Shaw Medical Center is May 16th, 1995. Did you visit the Shaw Medical Center between April 27th, 1995 and May the 16th, 1995?

A. No, I did not.

Q. Do you remember that specifically, that you did not visit them between -- visit Shaw Medical Center between April 27th, 1995 and May the 16th, 1995?

A. Yes.

Q. So your records are complete, there is nothing missing in here?

A. No, there's not.

Q. Thus far, the only missing record we have is a February 1st visit where you received a Depo-Provera shot, and we don't have a record of that?

A. Right. Yes.

Q. Now, I want to call your attention to Plaintiff's Exhibit Number 1. Do you see circled there where it says Depo-Provera March 1st, 1995?

A. Yes, I do.

Q. Did you pick up Depo-Provera from the pharmacy on March 1, 1995?

A. I don't recall.

Q. But you do recall getting a shot around February 1, 1995; is that correct?

A. Yes, I do.

Q. Do you understand when your next shot -- did you understand at that point when your next shot would have been due if you received it February 1, 1995?

A. It was my understanding it would be 12 weeks after February 1st.

Q. Why would you pick up one on March 1, 1994?

A. I don't recall.

Q. Do you recall getting that shot, being injected with that shot on March 1, 1994?

A. Not on March 1. No, I don't.

Q. Do you know what happened with this -- do you have any recollection at all of this Depo-Provera on March 1, 1995?

A. I don't recall.

Q. Okay. Back to Defendant's Exhibit Number 10. Just to make sure that we have everything straight, our medical records, according to your testimony, are correct, you have no information, no documents or any memory of any visits to Shaw Medical Center, other than the medical records, except around February 1, 1995, to receive the Depo-Provera shot?

A. Yes.

Q. That is through May the 16th, 1995?

A. Yes.

Q. Now, May 16th, 1995, according to your medical records, Defendant's Exhibit Number 10 and page number 263, you reported with a stomach ache and asking for a pregnancy test; is that correct?

A. Yes, it is.

Q. And you complained of vomiting for the past two days. The pregnancy test was in fact positive. Do you remember that?

A. Yes, I do.

Q. Did this pregnancy result in a live birth?

A. Yes, it did.

Q. And that is?

A. Sterling.

Q. Sterling. Now, look at Defendant's Exhibit Number 11, page 275 of the medical record. According to Defendant's Exhibit 11, Major Schalck, on May 17th, 1995, the next day, ordered a sonogram to be scheduled for you. Do you remember that?

A. Yes, she did.

Q. I call your attention to Defendant's Exhibit Number 12. This is the report of the sonogram performed on May 30th, 1995. And this report shows a five-week four-day fetus. Do you remember this sonogram?

A. Yes, I do.

Q. Do you remember that this sonogram was correct?

A. I don't understand.

Q. Okay. Were you given a report of this sonogram at the time?

A. Yes, I was.

Q. At the time did you believe that you were five-weeks four-days pregnant? Did you have any reason to believe this was incorrect?

A. At that time I believed it could have been a few days off, but other than --

Q. A few days off? How many days off?

A. I believe I was probably six weeks pregnant.

Q. You believe that you were six weeks pregnant, so it was really maybe three days off rather than --

A. Yes.

Q. Is that six weeks from conception or six weeks from your last menstrual period?

A. Six weeks from my last menstrual period.

Q. Okay. And that was your belief at that time. Is that still your belief?

A. Yes, it is.

Q. Now, on August 17th you had a second sonogram. Well, actually, August 16th. Defendant's Exhibit 13 is the report of that sonogram. From Exhibit 12 your estimated due date would have been January the 26th, 1996. Now, the second ultrasound showed the pregnancy at about 17 weeks, two days instead of 16 1/2 weeks, which would have been about approximately five days more, which would have been about two days more than what you thought, on May 1; is that correct?

A. Yes, it is.

Q. So we are all pretty close?

A. Yes.

Q. And you believe that that sonogram was pretty much in the ballpark with being correct?

A. Yes, I do.

Q. Now, you learned you were pregnant with Sterling on May the 16th, 1995; is that correct?

A. Yes, I did.

Q. Did you take a Depo-Provera shot after May 16, 1995?

A. No, I did not.

Q. Okay. Exhibit Number 14 is a authorization to release medical records. Who is Jacqueline Sankeralli, S-A-N-K-E-R-E-L-L-I?

A. That was a friend of ours, a friend of the family.

Q. Why did you release your medical records to her?

A. I don't recall.

Q. I call your attention to Exhibit Number 16. Now, the top part of this page, did you fill that information in?

A. Yes, I did.

Q. Now, according to the stamp at the bottom part of this page, this was during the prenatal review on July the 7th, 1995. Do you see where it says P&P? Do you know what that means?

A. No, I don't.

Q. That would be the date of your menstrual period prior to the last menstrual period, and you list there March 22nd. Do you think that was pretty much correct?

MR. WEINBERG: If you know.

BY MS. TRAPP:

Q. Do you remember filling out this form?

A. Yes, I do.

Q. Well, what would make you put March 20th there? I'm sorry, March 22nd?

A. I don't -- March 22nd would have been accurate, give or take a week.

Q. Okay. Ms. Drew, I'm not trying to trick you.

A. I'm trying to remember.

Q. Right. And then where it says BCP, that's the date that you took your birth control pills, and you have April 20th. Do you know why you put that date there?

A. No, I don't.

Q. Do you remember when you stopped taking your birth control pills?

A. I stopped taking my birth control pills because I was on them when I found out I was pregnant May 16th, and that's when I stopped taking them. I don't recall why I put April 20th. I did write that.

Q. That's fine. And then if you look down here it says April 2nd, 1995. That's the last monthly period. Do you know why you put that there, April 2nd, 1995?

A. No, I do not.

Q. What date was Sterling born?

A. He was born December 30th, '95.

Q. Was he a fullterm baby?

A. He was 36 weeks.

Q. Do you believe that to be correct?

A. Yes, I do.

Q. Now, to recap here, let's start back with, you took a Depo-Provera shot on June, sorry, July 28th, 1994?

A. Yes, I did.

Q. Okay. You took another Depo-Provera shot on October 24th, 1994?

A. Yes.

Q. According to your testimony but not in the records at Shaw, you took a third Depo-Provera shot sometime around February 1st, 1995?

A. Yes, I did.

Q. Were you given pregnancy tests prior to October 24, 1994, the Depo-Provera shot?

A. I was given a pregnancy test when I had the first shot, July.

Q. When you had the first shot in July 28 --

A. Right, because it was a six-week checkup and they gave me a pregnancy to make sure I wasn't pregnant.

Q. Even though you told them you had not resumed intercourse?

A. Yes, they did.

Q. And then you had your Depo-Provera shot, okay. Then on October 24th, 1994, did they give you a pregnancy test then?

A. No.

Q. They just gave the shot, okay. What about on February 1st or around that time 1995, did they give you a pregnancy test?

A. No, not that I can recall.

Q. They just gave you the shot. Did you have a Depo-Provera shot after February 1st, 1995?

A. Not that I can recall.

Q. Okay. Before Sterling's birth, you had no other Depo-Provera shot after February 1st, 1995?

A. Yes.

Q. And then after Sterling was born in February of 1996, please look at Defendant's Exhibit Number 18 right there. Look at the informed consent for Depo-Provera medication. Do you see that?

A. Excuse me?

Q. Do you see the informed consent for Depo-Provera medication?

A. Yes, I do.

Q. This is dated, this medical report is dated February the 15th, 1996. Did you sign that informed consent there?

A. Yes, I did.

Q. Did you read that informed consent?

A. Yes, I did.

Q. Did you understand that informed consent?

A. Yes, I did.

Q. On February 15th, 1996, according to Exhibit Number 19 -- which again, is this your handwriting on Number 19?

A. Yes, it is.

Q. It asks which birth control method you preferred and you wrote in Depo-Provera. Did you write that?

A. Yes, I did.

Q. And then Exhibit Number 20 shows that you were in fact given a Depo-Provera shot at that time?

A. Yes.

Q. On February of 1996. So you resumed the Depo-Provera as your birth control?

A. That is the last shot that I received.

Q. That was after Sterling's birth?

A. Yes.

Q. I want to go through parts of this complaint with you. I apologize. I should have made additional copies. I'm trying to work from my home with this foot and --

MS. BAILEY: Do you want me to make copies?

MS. TRAPP: That would be great, if you could make copies, and we'll put that in as exhibits as well.

MR. WEINBERG: Make copies of your --

MS. TRAPP: Complaint and interrogatories. (A recess transpired.)

MR. WEINBERG: She has not verified the answers to interrogatories. That's my fault. I was planning on having her do that today after the deposition, because her husband is going to have to do that too and he's still in Turkey.

MS. TRAPP: That's all right. (DEF. EXH. 21 and 22, Complaint (6 pages); Answers (9 pages), were marked for identification.)

MS. TRAPP: We're back on the record.

Q. Now, Ms. Drew, just for the record, while we were off the record your attorney noted that you have not yet verified or sworn to the answers in the interrogatories, which means that there could have some mistakes and errors in there. And if there are, just let me know as we go through them and we'll get this straight.

MR. WEINBERG: Okay.

BY MS. TRAPP:

Q. I call your attention to Exhibit Number 21, which is your complaint.

MR. WEINBERG: That's it right there.

BY MS. TRAPP:

Q. All right. Look at paragraph number 7, please, ma'am, on page 2. That says, as part of this treatment, Ms. Drew received birth control counseling, birth control medication in the form of intervenous injection of Depo-Provera.

We discussed earlier the difference between intravenous and intramuscular. Was that just an error, typo, typing intravenous? You received that Depo-Provera shot -- your testimony was that you received the Depo-Provera shot in your hip; is that correct?

A. Yes.

Q. So do you know where the term intervenous in Number 7 came from? And your lawyer could have done that.

A. I don't.

MR. WEINBERG: I did that.

BY MS. TRAPP:

Q. So you do not know how the term intravenous got into Number 7?

A. No.

Q. Is it you testimony you received the Depo-Provera injection in your hip?

A. Yes, it is.

MR. WEINBERG: We'll stipulate to that. That's no problem.

BY MS. TRAPP:

Q. Now, paragraph number 8: These Depo-Provera injections were administered to the plaintiff, Martha Drew, by the defendant, acting through its agents and servants in its duly constituted agency, the Department of the Air Force at Shaw Air Force Base, South Carolina, when the plaintiff, Martha Drew, was in fact pregnant with a minor plaintiff Sterling Drew.

When did you receive a Depo-Provera injection while you were pregnant with Sterling?

A. I didn't. No. My complaint was not that I received it while I was pregnant, but that I in fact got pregnant while I had it in my system.

Q. Your complaint is not that they gave you a shot while you were pregnant. Is it your testimony that they did not give you a shot while you were pregnant with Sterling?

A. Yes.

Q. But rather that you became pregnant when you should not have because you were using Depo-Provera. Is that your testimony?

A. Yes, it is.

Q. What is your understanding as to the effective period of a Depo-Provera injection? Do you understand what I'm saying?

A. As far as being able to get pregnant on Depo-Provera?

Q. What is your understanding about the period of time a Depo-Provera injection is supposed to keep you from getting pregnant?

A. I know that you are supposed to have it every 12 weeks. And I was told, and several friends of mine were told, if you go off the Depo-Provera shot that you are to take birth control. Like if you were going to get pregnant, you need to take it at least a year after you go off of the shot, because it is still in your system.

Q. So you believe the Depo-Provera is in your system for a year after you have the shot?

A. That's what I was told.

Q. Who told you that?

A. I was told that by Captain Miller.

Q. Captain Miller told you that Depo-Provera was in your system for a year?

A. Yes. And she informed me that if we decided that we wanted to have another child that as soon as I stopped taking it that I would need to go on another form of birth control for a year and then decide to get pregnant after that.

Q. She told you that prior to your taking Depo-Provera the first time?

A. Yes.

Q. Did Captain Miller give you any pamphlets on Depo-Provera?

A. Yes, she did.

Q. That was prior to your first shot?

A. Yes.

Q. In July of 1994?

A. My first shot is when she gave me the pamphlets.

Q. Is that when she counseled you concerning other forms of birth control should you decide to get pregnant in the future?

A. Yes.

Q. And is it your testimony that Captain Miller's advice was, if you decide to have another baby to stop taking Depo-Provera, use an alternative birth control for a year before having a baby?

A. Yes.

Q. What did you understand the reason for that would be?

A. The reason would be that if you got pregnant while you had Depo-Provera in your system that it could cause birth defects in the baby.

Q. That's what you understood before taking your first shot?

A. Yes, it was.

Q. And your testimony is that prior to getting pregnant with Sterling, the last shot you took was February 1st, 1995?

A. Around that day. Yes, it was.

Q. And so this lawsuit is you were complaining that beyond the 12 weeks, but rather the year period that you got pregnant, within the year of February 1st, 1995, that that would cause birth defects in Sterling?

A. Yes, it is.

Q. And that paragraph 8 is incorrect and that you were not pregnant with Sterling at the time you received the Depo-Provera shot?

A. Yes.

Q. Now, paragraph 9 in the complaint lists the allegations of how the United States was negligent. And it states that the defendant was negligent, reckless, willful and wanton in the administration of Depo-Provera to the plaintiff Martha Drew in the following particulars: In failing to appropriately supervise its personnel.

Do you know what sort of supervision the nurses and Captain Miller and Major Schalck had in terms of administering Depo-Provera? Do you know what the procedure was at Shaw? If you don't, that's fine. I'm asking you if you know.

A. I really don't.

Q. In failing to adopt appropriate policies, procedures to ensure that Depo-Provera would not be given to women who were in fact pregnant. You were not in fact pregnant. You already testified to that; is that correct?

A. Yes.

Q. In giving you Depo-Provera as a birth control device without first administering a pregnancy test.

If you were never pregnant when you received one then that wouldn't matter either, would it?

A. No, it wouldn't.

Q. In failing to follow the appropriate standard of care for the administration of Depo-Provera in that she was given Depo-Provera after the first five days of her menstrual cycle.

Again, as to the year before Sterling's birth that you are complaining of, that would make no difference; is that correct?

A. I don't understand the question.

Q. Okay. In failing to follow the appropriate standard of care for the administration of Depo-Provera in that she was given Depo-Provera after the first five days of her menstrual cycle. We'll just leave that one.

In failing to receive appropriate counseling and/or information concerning the risks and dangers in the use of Depo-Provera to any unborn child.

You testified just a moment ago that Captain Miller explained to you that you could encounter birth defects if you became pregnant within a year after your last shot of Depo-Provera; is that correct?

A. Yes, it is.

Q. And that you knew that before taking your first shot of Depo-Provera; is that correct?

A. Yes, it is.

MS. TRAPP: Can we go off the record for a moment?

(Off-the-record conference.)

(DEF. EXH. 23, Claim for Damage, Injury, or Death form, was marked for identification.)

BY MS. TRAPP:

Q. Ms. Drew, this is what's called an administrative claim which is required to be filed with the government prior to bringing a lawsuit. Down at the bottom, do you see the signature line? Did you sign this form?

A. Yes, I did.

Q. Did you read this form?

A. Yes.

Q. It says under number 8, spontaneous delivery of male infant with imperforated anus, ventricular septal defect, left facial palsy, umbilical hernia, another type of hernia, at Shaw Air Force Base Hospital. Depo-Provera injection given to claimant in early pregnancy.

Is that correct? Were you given a Depo-Provera shot in early pregnancy?

A. Prior to pregnancy.

Q. You were given a Depo-Provera shot prior to pregnancy but not during the pregnancy?

A. No.

Q. When did you first seek an attorney in this issue?

A. Beginning of August of '96.

Q. And who did you first go to?

A. Mr. Bagley.

Q. And what happened with Mr. Bagley's representation?

A. He died.

Q. Ms. Drew, I call your attention to Exhibit Number 22, your answers to -- plaintiff's answers to interrogatories.

MR. WEINBERG: I said this off the record. I'll put it on the record. She has not verified these.

BY MS. TRAPP:

Q. Look at question number 1. The answer, the second paragraph of the answer starts with the first sentence on the bottom of first page. Do you see that?

A. Uh-huh.

Q. The second page: Plaintiffs contend that malpractice was committed in the administration of Depo-Provera in that it was in fact given to her when she was pregnant with the minor child Sterling Drew. That's incorrect.

A. Yes, it is.

Q. Look at the last sentence right here. Do you see this?

A. Okay.

Q. That plaintiff Martha Drew further contends that she failed to receive appropriate counsel and information concerning the risks and dangers of the use of Depo-Provera to any unborn child and therefore was given Depo-Provera without her informed consent.

Did you not testify that Captain Miller, in fact, informed you that birth defects could result from the use of Depo-Provera?

A. Yes.

Q. So you were in fact informed; is that correct?

A. Yes, I was.

Q. Did you understand the information that Captain Miller gave you concerning birth defects?

A. Yes, I did.

MS. TRAPP: I thank you. I have no other questions. At this time we want to adjourn this deposition.

MR. WEINBERG: All right. I would like to ask a few questions.

MS. TRAPP: Go right ahead.

EXAMINATION

BY MR. WEINBERG:

Q. When you were told about the risks of Depo-Provera -- let me ask you this: Why did you decide to choose Depo-Provera as a birth control device?

A. Because I originally wanted to have my tubes tied, and I was told that Depo-Provera would be the next most effective thing to having your tubes tied.

Q. What were you led to believe about the effectiveness of Depo-Provera and by who?

A. Captain Miller told me that there was a 99.9 percent effectiveness rate. In other words, it's like .1 percent that you would get pregnant and there is not at all any percent that the baby would survive.

Q. Tell me what you mean by that, not at all percent that a baby would survive.

A. That if there is that .1 that you do get pregnant, then you would have a miscarriage. The baby would die.

Q. So as far as live birth is concerned, you were told that the Depo-Provera was a hundred percent effective, right?

A. Right. Yes.

Q. And why didn't you get your tubes tied?

A. Because they told me that I needed to either be 25 or have three children.

Q. How old were you at the time?

A. I was 20.

Q. How old are you now?

A. Twenty-four.

MR. WEINBERG: That's all I have.

MS. TRAPP: I have a couple more.

EXAMINATION

BY MS. TRAPP:

Q. At the time you became pregnant with Sterling, what birth control method were you using?

A. At the time I became pregnant with Sterling I was on Depo-Provera.

Q. And that was your sole birth control method?

A. Yes.

Q. I call your attention to Defendant's Exhibit Number 8. April 27th, 1995. Your handwriting; is that correct?

A. That's my handwriting.

Q. Okay. You were pregnant with Sterling on April 27th, 1995?

A. To my knowledge, I was.

Q. When do you believe that you became pregnant with Sterling?

A. I believe I became pregnant with Sterling the second week of April.

Q. I'm asking you not your last menstrual period, which you reported here as April 13, 1995. I'm asking you about the conception date.

A. Okay. The first week of April.

Q. The first week of April?

A. Uh-huh, around the 1st.

Q. But your last menstrual period was April 13th. You believe that you had a menstrual period after you became pregnant?

A. Yes, I do.

Q. You testified a few minutes ago the ultrasound taken May 30th was correct and showed a five-week four-day fetus, which was from the last menstrual period. Do you know when five weeks from May 30th would have been?

A. It would have been the third week in April.

Q. Then take four days from it, it would be approximately the 13th of April, just like what you said here, right?

A. Yes. I said give or take a couple --

Q. Which would mean that you got pregnant after April 13th.

A. I don't believe I did.

Q. Okay. That's fine. You say you got pregnant April the 1st. When was your last Depo-Provera shot?

A. The last Depo-Provera shot was around the 1st of February.

Q. Okay. Now, here on April 27th you report that you were using birth control pills.

A. To regulate the bleeding.

Q. To regulate the bleeding. Okay. I think I'm understanding now. What you're saying is that you were using Depo-Provera as your sole birth control method and you became pregnant?

A. Yes.

Q. That it didn't work?

A. Yes.

Q. It did not work?

A. Yes.

MS. TRAPP: Thank you. We adjourn this deposition.

(The witness, after having been advised of her right to read and sign this transcript, waives that right.)

(The deposition was adjourned at 11:43 a.m.)

CERTIFICATE OF REPORTER

I, Janet L. LeVeque, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the witness was duly sworn to testify to the truth, the whole truth, and nothing but the truth; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing deposition as typed is a true, accurate, and complete record of the testimony of the witness and of all objections made at the time of the examination.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 5th day of September, 1998 at Columbia, Richland County, South Carolina.

/s/______________________
Janet L. LeVeque
Notary Public State of South
Carolina at Large.
My Commission expires
July 3, 2006

APPENDIX L

AFLSA/JACT
1501 Wilson Blvd., Ste. 835
Arlington VA 22209-2403

23 Dec 1997

M.M. Weinberg, III
Weinberg, Brown & McMillan
109 North Main Street
Sumter, South Carolina 29151-1289

RE: Medical Malpractice Claim of Sterling, Martha and Jebediah Drew
Air Force Claim No.: Shaw AFB 97-292

Dear Mr. Weinberg:

I have considered your clients' claim alleging medical malpractice by the OB/GYN providers at Shaw AFB SC under the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (b), 2671-2680. After a careful review of the facts and the applicable law, I must deny the claim.

There are several reasons for my denial. You allege that Mrs. Drew received an injection of Depo-Provera early in her pregnancy with Sterling Drew, which caused Sterling's birth defects. Sterling Drew was born on 29 December 1995. The record clearly demonstrates that the last documented injection was given on 24 October 1994, more that 14 months prior to Sterling's birth. Even if we accept that the final injections was given on or about 1 February 1995, as Mrs. Drew asserts, that is still 11 months prior to Sterling's birth.

It does not appear possible that Mrs. Drew could have received an injection of Depo-Provera while she was pregnant with Sterling.

Injections of Depo-Provera are effective for contraception for at least 12 weeks. This makes it highly unlikely that Mr. Drew received an injection on 1 or 2 February, as she claims. However, it is certainly possible, as with any contraceptive method, for the Depo-Provera to have failed to prevent pregnancy. This hardly amounts to evidence of negligence. It is also possible that if the Depo-Provera had been injected in early February, Sterling Drew may have been exposed to progesterone pre-natally. However, there is no scientific basis for attributing any of his developmental anomalies to intra-uterine hormone exposure. Thus, not only is there no evidence of negligence in the care rendered to Mrs. Drew, there is no evidence that any act or omission relative to her OB/GYN care causally contributed to Sterling's unfortunate conditions.

The Air Force sincerely regrets that Mrs. Drew was not satisfied with her care, but, without evidence of negligence, the claim cannot be paid.

This is the final denial of your clients' claim. I am required to inform you that if they are dissatisfied with this decision, they may file suit in an appropriate United States District Court not later than six months after the date of the mailing of this letter.

Sincerely,

/s/
ERIC S. ISRAEL, Major, USAF
Chief, Medical Law Branch
Tort Claims and Litigation Division
Air Force Legal Services Agency

APPENDIX M

CLAIM FOR DAMAGE, INJURY, OR DEATH

DATED November 21, 1996

[Fold-out]

CLAIM FOR DAMAGE, INJURY, OR DEATH	**INSTRUCTIONS:** Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008 EXPIRES 4-30-94

1. Submit To Appropriate Federal Agency: Shaw Air Force Base c/o USAF Claims 20th Fighter Wing JAD 504 Shaw Drive Shaw Air Force Base, South Carolina 29152-5028	2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)* Martha Drew, Jebediah Drew & Sterling Drew c/o Bobby R. Bagley, Esquire Post Office Box 1119 Sumter, South Carolina 29151-1119

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
☒ MILITARY ☒ CIVILIAN	12/30/95	M	12/30/95	12:32 a.m.

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)*

Spontaneous delivery of male infant with imperforated anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital.

Depo-Provera injection given to claimant in early pregnancy.

GOVERNMENT EXHIBIT

1

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

N/A

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Imperforated anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia

11. **WITNESSES**

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Jebediah Drew	5351 A North Mulberry Street Shaw Air Force Base, South Carolina 29152
All medical personnel related to this specific case.	Shaw Air Force Base Hospital

12. *(See instructions on reverse)* **AMOUNT OF CLAIM** *(in dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	15,000,000.00	N/A	15,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
Jebediah Drew Martha Drew	(803) 778-7404	11/21/96

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*	**CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS** Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

Rec'd 6 Dec 96 ([illegible] - mail)

95-109
Previous editions not usable.

NSN 7540-00-634-4046

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97-

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible? No

17. If deductible, state amount N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

BEST AVAILABLE COPY